United States Court of Appeals
for the Second Circuit

APPELLEE'S APPENDIX

Affidavit

77-6161

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-6161

UNITED STATES COURT OF APPEALS
FILED
DEC 21 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

LLEWELYN S. BAILEY,
Plaintiff-Appellant,

—v.—

VETERANS ADMINISTRATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLEE'S BRIEF

ROBERT B. FISKE, JR.,
United States Attorney for the
Southern District of New York,
Attorney for Defendant-Appellee.

EILEEN FITZGERALD SUDLER,
MICHAEL H. DOLINGER,
Assistant United States Attorneys,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

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PROCEEDINGS

Fld Complt. & Iss. Summs.

2. Filed Summs with Marshal's Return:
Served: by: dated:
Director of Veterans Admin. Johnson 1-28-77

3. Filed ANSWER by deft. U.S.At

4. Filed Pltffs. notice of motion for reinstatemnet with full compensation.

5. Filed deft's Notice of Cross-Motion for summary judgment. Ret: 7-1-77 at 2:15 pm.

6. Filed deft's memo of law in support of its cross-motion for summary judgment.

Fld memo end on bk of document#4=Motion denied. See Memo Dec this date.MacMahon,J.mn

Fld memo end on bk of doument#5=Motion granted. See memo dec of this date..... ....MacMahon,J. mn

7 Fld Memorandum...Accordingly, pltff's motion for summ judg is denied; deft's cross-motion for summ judgment is granted;and the action is dismissed. So Ordered... MacMahon,J. mn

Fld Judgment that pltff's motion for summ judg is denied...and that deft's cross motion for summ judg is granted and the action is dismissed....R. F. Burghardt,Clerk .....Judg Ent 9-1-77Clerk mn

Filed Notice of Appeal to the ZU.S.C.A. 2nd from the judgement that removal action is affirmed & motion therefrom is denied ent. 8-31-77.

Filed Notice that the record on appeal has been certified and transmitted to the U.S.C.A. 2nd circuit.

A 2

Dir. of V.A.

SUMMONS IN A CIVIL ACTION

CIV. 1a (7-44)
(Formerly D.C. Form No.45a Rev. (7-49))

United States District Court

FOR THE

SOUTHERN DIST of N.Y. — Judge MacMahon

76 CIVIL ACTION FILE No. 5381

ENGINEERING SERVICE
1955 .31 8 56

LLEWELYN. S. BAILEY Plaintiff v. VETERANS ADMINISTRATION Defendant	SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

plaintiff's ~~attorney~~ Pro se , whose address

LLEWELYN . S. BAILEY
645 E. 14th ST,
NEW YORK, N.Y. 10009

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Raymond F. Burghardt
Clerk of Court.

R. Wasserman
Deputy Clerk.

Date: Dec 3, 1976

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

JUDGE MAC MAHON A 3

76 CIV. 538

ENGINEERING SERVICE

1976 JAN 31 8 57

December 3. 1975

United States District Court
Southern District Of New York

Llewelyn. S.Bailey
Plaintiff

V

Veterans Administration
Defendant

Federal Employee Appeals.
752 Subpart B. Civil Service Regulations

1. Defendant resides at 408 First Ave N.Y.C 10010

2 Claim Arose at 408 First Ave. N Y C 10010

3. I live at 545 East 14th Street N.Y.C. 10009

NATURE OF COMPLAINT.

On Friday the 14th of May 1975 at 9:10 p m While in the employment of above mentioned agency I observed a visitor Mr. Harold Schwartz overstaying his time. When asked to leave premises he refused I took necessary action and issued two summons. Mr. Schartz later complained that I punched him in the face, about twenty eight days later I was given a proposed removal letter and was removed on the 13th of July 1975. Although there was conflicting statements and lack of corroboration my removal action was affirmed and appeal denied by the Civil Service Commission. As a result I asked for a review in this matter.

Llewelyn S. Bailey
Llewelyn S. Bailey
545 East 14th Street
New York N Y. 10009
212 674 4902

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. [illegible] COURT
4-4-77

- x

LLEWELYN S. BAILEY,	:	
Plaintiff,	:	ANSWER
-v.-	:	76 Civ. 5381 (LFM)
VETERANS ADMINISTRATION,	:	
Defendant.	:	

- x

The United States of America, by its attorney Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, for its answer to the complaint herein states:

1. Denies the allegation contained in paragraph one, but states that the Veterans Administration operates a hospital at 408 First Avenue, New York, New York 10010.

2. Denies the allegation contained in paragraph two, but states that an incident involving plaintiff did occur at 408 First Avenue, New York, New York 10010 on May 14, 1976.

3. Denies having knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph three.

4. Denies each and every allegation contained in the paragraph entitled "Nature of the Complaint" except admits that plaintiff was removed from his job as a resul

of an incident which took place on May 14, 1976 at 408 First Avenue, New York, New York.

FIRST AFFIRMATIVE DEFENSE

The court lacks subject matter jurisdiction over this action.

SECOND AFFIRMATIVE DEFENSE

The court lacks jurisdiction over the person of the defendant.

THIRD AFFIRMATIVE DEFENSE

Plaintiff has failed to state a claim upon which relief may be granted.

WHEREFORE, defendant demands judgment dismissing the complaint and for such other and further relief as to the court seems proper, including costs.

Dated: New York, New York
March 31, 1977

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant

By: Eileen M. FitzGerald
EILEEN M. FITZGERALD
Assistant United States Attorney
Office and P.O. Address
One St. Andrew's Plaza
New York, New York 10007
(212) 791-1994

A 6

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
****

LLEWELYN S. BAILEY,

PLAINTIFF, *

*v. *

VETERANS ADMINISTRATION, *

DEFENDANT. *
****

PROSE 76 (CVI.) 5381
(LFM)

*MOTION
****

(1) What am I asking for ;

Reinstatement with full compensation.

(2) Reason why judge should grant request ;

(a) On the date and time of incident I was acting under the sole jurisdiction of the Administration as to their rules and regulations.

(b) Undue process by Administration not informing me of complaint against me until (21) twenty one days and a further (7) seven days later that action would be taken as to my removal from employment making this a total of (28) days.

(c) That the hearing was bias.

(d) That the evidence was conflicting and none corroborative by all witnesses.

(e) There was no indipendent witnesses , the only (2) two witness was the accused who become the complainant against me and his friend who is an interested party.

(f) There was no physical evidence present as to swelling, scratch, abrasions, black and blue nor medical evidence to back up his story that I did punched him in his face.

(g) That accused did conducted himself in a noisy manner and refused to leave premises when asked to do so and that both summons issued to accused by were void bythe Administration without accused answering same in court.

(h) That the law of the land clearly states that an accused person (meaning myself) should be proved guilty beyond all reasonable grounds.

(i) That the Administration failed to estab lished a case beyond reasonable doubt. On these grounds I am asking that this matter be resolve in favour.

A 7

Dated : May 6,th. 1977.

Llewelyn S. Bailey
****

LLEWELYN S. BAILEY.
645 E 14 th. Street,
New York. N.Y 10009,
(212) 674-4902.

EMF:ets
76-0704

6-7-77

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

LLEWELYN S. BAILEY, : **NOTICE OF DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiff, :

-v.- : 76 Civ. 5381 (LFM)

VETERANS ADMINISTRATION, :

Defendant. :

- -x

SIRS:

PLEASE TAKE NOTICE that upon the annexed Memorandum of Law and exhibits (including the transcript of plaintiff's administrative hearing), defendant will cross-move for summary judgment in its favor pursuant to Rule 56 of the Federal Rules of Civil Procedure on the 1st day of July, 1977 at 2:15 p.m. or as soon thereafter as counsel may be heard.

m#8

Dated: New York, New York
June 7, 1977

Yours, etc.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Defendant.

By: /s/
EILEEN M. FITZGERALD
Assistant United States Attorney
Office and Post Office Address:
One St. Andrew's Plaza
New York, New York 10007
(212) 791-1994

UNITED STATES CIVIL SERVICE COMMISSTION - NEW YORK REGION

---------------------------X

In the Matter of the Appeal
under Part 752-B of

LLEWELYN S. BAILEY

Appellant

---------------------------X

26 Federal Plaza
New York, New York
room 2331
September 14, 1976
10:00 A.M.

BEFORE:

Denis Marachi, Hearing Officer

APPEARANCES:

James Forsetta, agency representative
Julian Linker, Esq., employee representative

PRESENT:

Llewelyn S. Bailey, Appellant

WITNESSES:

Harold S. Schwartz
Joseph Kaswan
William Parker
David R. Siley
Samuel B. Mitzner
Michael Everett

EXHIBIT A

HEARING OFFICER MARACHI: The hearing is called to order. The New York Region of the U.S. Civil Service Commission has before it an appeal under Part 752, Subpart B of the U.S. Civil Service Regulations. Llewelyn S. Bailey has appealed the decision of the Veteran's Administration Hospital New York, New York, to remove him from the position of supervisory police officer Gs-6.

We are convened to give the appellant the hearing he has requested in connection with his appeal. I have been designated the appeals officer. My name is Dennis Marachi. The appellant is represented by Julian Linker, attorney at law. The agency is represented by Mr. James Forsetta, Hospital Administrative Officer.

The purpose of this hearing is to afford the appellant and the VA an opportunity to present evidence and to make representations in support of their respective views. The proceeding will be informal with the VA presenting its evidence first. Each party may examine and cross examine witnesses. The parties may object to testimony or other evidence which is clearly irrelevant, immaterial or repetitious. The technical objections to testimony as used in a court of law will not be sustained.

A verbatim transcript of the hearing will be prepared and forwarded to the parties at the time our decision is issued. Mr. Forsetta, do you have an opening statement for the agency?

MR. FORSETTA: Yes, I have a very brief opening statement. It is the intent of the VA Hospital in Manhattan to prove that on May 14th, 1976, Mr. Bailey struck a visitor by the name of Harold S. Schwartz, that this action was witnessed by a Joseph Kaswan, that this act constituted aviolation of the VA rules and regulations, specifically dealing with Supplement MP-1, Part 1, "Exchange 29", Section F, dealing with hospital police code of conduct, Part 2 of Section F.

I would like to ---

HEARING OFFICER MARACHI: The document you just made reference to, is it part of the record at this time?

MR. FORSETTA: It is part of the initial record. I don't know if it's part of your record but I do have an exhibit if you would like that, I can submit it to you right now.

HEARING OFFICER MARACHI: All right. Let me review this document so I can see if it's the same as the one in the file. I have reviewed the document referred to by Mr. Forsetta and it is already part of the record submitted by the agency.

Mr. Linker, do you have an opening statement for the appellant.

MR. LINKER: Yes, I have. Preliminarily, as I mentioned before, I have a motion to dismiss the discharge of Mr. Bailey and restore his status. His basic due process was violated up to this point as an appellant. While you did state, I believe, that the burden of proof is on the Veteran's Administration, nonetheless, is Mr. Bailey in the position of an appellant, and believe it or not, he has not even been interviewed to this state as to what happened on that day, May 14th, 1976.

That in and of itself is a violation of basic due process. Now, this incident happened May 14th, 1976 and Mr. Bailey was not even notified that anything was going to happen to him until June 4, 1976, June 3 or 4, 1976. Nearly more than 25 days, about two and a half weeks, after May 14th, when it happened.

When he was so told the first time, his first notice of it was to be placed on an administrative five-day suspension and given a directive for that. Even then, Mr. Siley came into Mr. Horton's office and gave him an administrative five-day suspension. Even then, he was not interviewed but asked to submit a written statement, which he did and is part of your written record.

Subsequent to that, Mr. Bailey was not even asked if he wanted a counsel at anytime during the investigation against him. At no time was Mr. Bailey afforded an opportunity to comfront his accusers. He hasn't seen his accusers since May 14th until today.

There was, of course, as you will point out, no hearing whatsoever, until today. Now while a hearing might not be technically absolutely necessary, nonetheless, basic due process should still be afforded Mr. - there would be members of the union here will show, in this case, the contract as well as the regulations, the basic contract and the procedures on the contract were blatantly violated in this lack of due process against Mr. Bailey. They were not followed at all.

HEARING OFFICER MARACHI: All right. For purposes of the record, we will try and clarify the objective that you're raising. It is essentially, I think, one where you're stating that because the appellant was not afforded a pre-termination hearing, his due process rights had been violated.

MR. LINKER: I stated, sir, that while a hearing might not be technically required in this case, the violation of due process was so inherently gross, so blatant and so bad in that he was not even interviewed, if you please, until today, that his due process was violated and in that he was not afforded counsel at any time.

HEARING OFFICER MARACHI: Okay. As concerns this interview, I think the record should indicate that nonetheless he was afforded the opportunity to reply in writing and orally to the proposed, you know, the advance notice.

MR. LINKER: Yes sir, but not until a more than unreasonable length of time had elapsed from the time of the incident and the time the incident was reported, until he was first so notified. Now, I must state that later, sometime in June, there is a memorandum which sets forth within the memorandum, out of sequence if you please, that back on May 13th, five days after the incident, Mr. Bailey was interviewed. Out of sequence, out of chronological sequence.

No statement of that interview is in the record, no statement of Mr. Bailey's was asked to be part of the record as of that date. But it was only after June 4th, which is the first time Mr. Bailey, any inkling before June 4th, Mr. Bailey never had any inkling of it, that Mr. Bailey was asked to submit a written statement.

So that basic due process destroyed his chance to prepare, I didn't say just destroyed, but it impaired his right to even show his defense stronger than we have now. That's my motion and I respectfully ask you to reserve decision.

HEARING OFFICER MARACHI: But I will make a decision on the motion to the extent that there is a recent Supreme Court Case on "Ed. V. Kannedy" that deals substantially with the contention you've raised this morning and in that case it was held by the majority of the Supreme Court that a pre-termination hearing was not necessary before an employee was terminated from employment and that

Arnett v Kennedy 416 U.S. 134 (1974)

this lack of a pre-termination hearing did not violate due process, his due process rights.

MR. LINKER: May I proceed now with the opening statement.

HEARING OFFICER MARACHI: All right. You may do that.

MR. LINKER: It's going to be our contention, our defense that Mr. Bailey never struck Mr. Schwartz at any time whatsoever and I believe the prosecution witnesses will verify that Mr. Schwartz came into the office and issued two summonses to Mr. Schwartz that Mr. Schwartz had absolutely no right at 9:10 to be in the lobby, as well as Mr. Kaswan.

And further that Mr. Bailey could have issued additional summonses, namely other violations. It will be borne out in the record that Mr. Schwartz blatantly violated such as not following the directory signs posted and actually went through barriers to get into the lobby.

We also show that the eye witness testimony of Mr. Kaswan is impossible to sustain. We will show that Mr. Schwartz himself had an ulterior motive in bringing this case and we believe that the sustaining of the burden of proof and we will show that this man had never been in the slightest bit of trouble before. He's been a policeman all his life, prior even to his Veteran's Administration tenure.

HEARING OFFICER MARACHI: All right, I thank you Mr. Linker. Now, Mr. Forsetta, are you prepared to move forward with the agency's case?

MR. FORSETTA: Yes, I am.

HEARING OFFICER MARACHI: All right, would you like to call your first witness?

MR. FORESETTA: Yes.

HEARING OFFICER MARACHI: Do you solemnly swear that the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you god?

MR. SCHWARTZ: I do.

HAROLD SCHWARTZ

having been duly sworn, testified as follows:

HEARING OFFICER MARACHI: All right. Will you state your full name and --

THE WITNESS: Harold ---

HEARING OFFICER MARACHI: All right. Go ahead.

THE WITNESS: Harold S. Schwartz.

HEARING OFFICER MARACHI: All right and you are not an employee of the agency?

THE WITNESS: No.

HEARING OFFICER MARACHI: All right, do you have any objections as to identifying what your position or your occupation is at this time?

THE WITNESS: None at all. I'm a consultant in independent practice. In other words, I work alone. Self-employed.

HEARING OFFICER MARACHI: All right. In what area may I ask.

THE WITNESS: Two areas. Electronics engineering and business planning.

HEARING OFFICER MARACHI: All right. Mr. Forsetta, would you like to begin the examination of the witness.

DIRECT EXAMINATION

BY MR. FORSETTA:

Q Mr. Schwartz, would you please indicate what transpired on the evening of May 14th, while you were at the hospital?

A You'd like a complete ---

Q I'd like a complete story, yes.

A Well, if you'll give me just half a moment to get my thoughts together. Okay. What happneed was that I was visiting my friend, Mr. Joseph Kaswan, who was a patient at the hospital. Had just undergone surgery and was in the hospital recuperating. During the course of the evening, we were involved rather deeply, you know, in conversation and all of a sudden, a nurse came in and said, ooh, it's after hours.

This was the first I heard. This was about ten minutes to nine. So I said, well, I'd better go, Joe and at that point Joe said, well, it's after hours. Let me come down with you. He was in a wheelchair. To make sure that you have no problems, because you know, you should have been out.

So I waited for him to get into his wheelchair and we went out to the elevator and down to the street level and we were on our way to the door when - there was a guard off on the left side, closing some, I guess you'd call them doors that were, that provide access to the information desk or something of that sort.

At the time his back was to us and he said something which was impossible to make out. My friend Joe said that -

Q Just one second. Who said this? Who said there was someone standing there. Is that gentlemen here today? Who was talking to you?

A Right.

Q Would you identify him please?

A Yes. That was Mr. Bailey.

Q Okay. Go ahead.

A Joe said, I beg your pardon. I couldn't hear you. He still had his back to us and repeated something again and Joe again said, I'm sorry. I still can't hear you. At that point, he turned around and said, you could hear very well - well something to that - I cannot, at this point, remember the precise words. You heard very well what was said and at that point, I objected.

I said you have no call to make such a statement. You know you're calling the man a liar without cause. At that point, he quickly changed his tack and said, what are you doing here now? You're not supposed to be here now? All the time moving towards me. At which point, he finished that statement. He had reached me.

He grabbed hold of me and said, I'm going to give you some summonses.

Q He grabbed a hold of where - your arm, your shoulder?

A My arm. That's correct. He said come with me.

HEARING OFFICER MARACHI: Could youwait one second.

A Well, I objected to that. I wanted to know where I was going and what this was all about. This was extremely sudden. As far as I could see, there was absolutely no justification whatsoever for what took place. At that point, he starts pulling and trying to drag me. He says, I'm taking you in the back room.

I said, I'm not going anyplace until, you know, tell me what this is all about.

HEARING OFFICER MARACHI: Could you wait one second please?

A I don't remember now precisely, but it was around this time that another guard came up. It was right around the time that he was saying if I didn't come, he was going to put me in handcuffs and get more guards to help him physically drag me inside. The other guard was, you know, approached things much more reasonably.

He first of all explained to me what was going on, which up to that point, I had no idea of and you know, he said that he would come along too, because that I obviously ——

MR. LINKER: We object to reasons.

HEARING OFFICER MARACHI: I'll permit the witness to testify on that. Continue.

A Well, he saw that I obviously - he was trying, you know, get this thing handled with as little fuss and bother as possible and saw that I was not, did not appear willing to go along with Mr. Bailey.

Q At no time Mr. Bailey explained to you what he was doing.

A Never.

Q He just said, let's go into the room.

A That's correct. He not only said, let's go, he was continually pulling on my arm, trying to drag me in.

Q He was forcibly trying to remove you fom the lobby into this area.

A That's correct.

Q Okay.

MR. LINKER: I object to the leading questions.

MR. FORSETTA: I am just trying to clarify the issue, that's all. Since the issue here is physical use ——

MR. LINKER: I object to counsel testifying.

MR. FORSETTA: I'm trying to explain to the Hearing Officer what my intent is here since you raised an objection. Can I continue or shall I ——

HEARING OFFICER MARACHI: No, I think I understand, you know, what the problem is as far as the direction and what you are trying to do. I realize you're not an attorney. Sometimes it's a little difficult to grasp, you know, certain legal concepts, but what' he's trying essentially to do is stop you from asking leading questions. I know, you know, you're trying to just ascertain the facts that we already have in the record. I think in doing that it would be more helpful, as far as the testimony of this witness, and the validity to be placed on it, if you would ask him questions, objective-type questions and let him respond to the specific - it would be a better way to approach it.

All right, continue, Mr. Schwartz.

BY MR. FORSETTA: (Continuing)

A I don't know where we were. Oh, at that point, the other guard had explained to me and said he was going to come along too.

Q Do you recall the name of this other guard?

A No, I don't. I never had a chance to find out anyone's name. The first that I knew of anyone's name was later on when I saw the two summonses that were issued, but this is jumping ahead of the story. That I saw Mr. Bailey's name. Up to that point, I knew nobody's name.

Q Okay. Continue.

A I went with the guards into a room behind the desk andthe door was closed. My friend Joe wanted to come in too, but they insisted that he had to remain outside, so he stayed outside, watching the door. The door was closed. There was a shade on the door, which was pulled down covering the glass top.

At this - I think it was - I'm trying to remember - get things into correct order - but I think it was at this point that I was asked for some identification. At that point, I wanted to question this because I was not just going to give up something that I didn't know that I was going to get back.

Mr. Bailey, all through this time, was extremely preemptory. He merely issued commands. He never explained a signle thing. He never said anything other than do this. The other guard who was in there said, you know, he just wants the identification to get my name and address from and that it would be returned to me as soon as he had filled out the summonses.

At that point, I took my wallet out and provided some identification. Now, it was somewheres along - now, I don't recall again precisely what the sequence was - but another guard came in and as I recall, the other two guards were going in and out as this process was going on. At that point, I was told by Mr. Bailey to sit down, in a chair, and I saw no reason why I had to sit down. I was going to stand there. I was told, no. I had to sit down and if I didn't sit down, I was going to be made to sit down.

So I did sit down and he proceeded to write out the summonses and this took an extraordinarily long time.

Q Can you give us an idea of how long extraordinarily is, since that's a vague term?

A Well, I think that it should have taken three or four minutes to fill out each summons at the most. I would say, again I can't be sure, but again I would say that it took a good twenty minutes to half an hour.

HEARING OFFICER MARACHI: All together or for each summons?

THE WITNESS: For both summonses. For god's sake, there are only like thirty or forty words to be written on each summons. Maximum. I'm sure thereis no more than that. During this time, I got a little bit restless and I got up, at that point, Mr. Bailey didn't make any comments about my not sitting down.

MR. LINKER: Could we have what point the witness got up.

THE WITNESS: At the point where I began to get restless when this was going on for what seemed to me an interminable length.

HEARING OFFICER MARACHI: This was while Mr.

Bailey was filling out the summonses?

THE WITNESS: That's correct.

MR. LINKER: Could we have that time? Was that twenty minutes to a half hour or some other time?

HEARING OFFICER MARACHI: I think hesaid the summonses took approximately twenty to thirty minutes to complete. At what point would you say? About half way?

THE WITNESS: That's a little difficult to say. I'd don't know. I would say at this point at least ten minutes ----

HEARING OFFICER MARACHI: Had elapsed?

THE WITNESS: Had elapsed.

HEARING OFFICER MARACHI: All right.

MR. LINKER: After the identification?

THE WITNESS: After the identification was provided and after Mr. Bailey started to write the summonses.

MR. LINKER: And after he directed you to sit down?

THE WITNESS: Correct.

MR. LINKER: That period of time had elapsed ---

THE WITNESS: I had been sitting there for. I would say, a good ten minutes when, you know, I was doing nothing but sitting there. It was getting, I was getting very fidgety. So I got up. At this point, neither of the other two guards were in the room.

I walked over towards the door and I said, I want to let my friend, Joe, know that I am still here and I reached out. I put my hand on the door knob.

MR. LINKER: Could you wait one second. Thank you.

A Well, as soon as I started to say, that I was going to let my friend, Joe, know that I was still there, cause he was waiting outside. I was concerned about him, as a matter of fact, I was going to suggest that he go upstairs. And back to bed. Cause I didn't think that it was, you know, that good for him to be ---

MR. LINKER: Excuse me, Mr. Schwartz. I object to what the witness thinks.

THE WITNESS: I'm explaining my actions.

A Without making any attempt to find out what was in my mind or what I was attempting to do or why or to say anything whatsoever, Mr. Bailey, as soon as I started to say something, jumped up from his chair, came running over, pulled back his right arm, I was to the left of the door. The door opened inwards, this way. I don't know any way to explain it more completely than to through motions and I was standing to the left of the door.

Now he came, he was to my - well, he was facing directly towards me at the time. Pulled back his right arm, as he did that, his right elbow struck the door, struck the shade and the shade went flying up. This was preparatory to hitting me in the face, which he proceeded to do and grab me and drag me back to the chair.

Q What was your reaction? What action did you when he had struck you?

A I took no action. I had no desire, first of all, to make a bad situation worse and secondly, I was aware that he had struck me in full view of witnesses.

Q The witnesses were ---

A Well, I don't know whether the two guards were watching or not. They were out there. They could have seen if they had been looking. But my friend Joe was sitting there in his wheelchair facing the door and as the shade went up, I saw him sitting there, looking directly at me.

Mr. Bailey finished making out the summonses finally, returned my identification to me and I left.

Q Mr. Schwartz, how the altercation ----

A I beg your pardon.

Q Were you separated by anyone? Did anyone enter the room during the altercation?

A I don't at this point recall. I do not recall that anyone else entered the room at that point. Maybe - I have sort of a dim recollection, but it's not sufficiently clear that I want to make such a statement. It was some four months ago that this occurred.

QQ Anything else?

A No, I went home and sat down and wrote out a statement, at that point, of what had occurred. Because I thought that this was totally uncalled for - the situation - and one that I was not prepared to just let slide.

Q During the initial, your initally entering the lobby, was there anything visible there that prohibited you from going into the lobby, saying you could not enter the lobby? I'm talking about when you came off the elevator.

A Not that I recall. There was certainly no barrier there.

Q During the - would you characterize the exchange, if you could, between Mr. Bailey and Mr. Kaswan? Would you recount what happened.

MR. LINKER: I object.

HEARING OFFICER MARACHI: I think the witness has adequately described that portion of the incident. As far as the blow itself that you allegedly received, was it in the face area?

THE WITNESS: Right on the jaw.

HEARING OFFICER MARACHI: And he hit you, as best as you recall, what - once?

THE WITNESS: Once.

HEARING OFFICER MARACHI: Okay.

THE WITNESS: I'm positive of that.

HEARING OFFICER MARACHI: All right. Was it a hard blow? I mean, did you fall down?

THE WITNESS: No.

HEARING OFFICER MARACHI: Did you in any way seek any kind of treatments afterwards for this?

THE WITNESS: No.

HEARING OFFICER MARACHI: Was your face bruised? I mean, did you have a mark from it?

THE WITNESS: Oh yes. There was a - it was sore and it was slightly swollen for close to two weeks. There were also several bruises on my upper arm where Mr. Bailey had grabbed me at some point along the way. The skin wasslightly broken there but that was the total extent.

HEARING OFFICER MARACHI: You did not seek any kind of medical treatment for these bruises?

THE WITNESS: No sir, I do not seek medical treatment readily. I have always been active in engaging in sports and this sort of thing - I did box in college and you know, this was not the sort of thing ---

HEARING OFFICER MARACHI: You felt required medical attention.

THE WITNESS: No. There wasn't anything that a doctor could do that I couldn't do for myself.

HEARING OFFICER MARACHI: All right. Mr. Forsetta, do you have anything further?

MR. FORSETTA: I have nothing further.

HEARING OFFICER MARACHI: All right. Mr. Linker, would you like to cross examine?

MR. LINKER: Yes.

CROSS EXAMINATION

BY MR. LINKER:

Q THE WITNESS: I would like to say one thing more. I am under oath now. I was not under oath when I wrote that out. However, I will now state, under oath, that everything that I wrote there was true, to the best of my knowledge and recollection, and I am willing to stand by everything that I said in that.

HEARING OFFICER MARACHI: Mr. Linker, would you like to cross examine.

MR. LINKER: Yes.

CROSS EXAMINATION BY MR. LINKER:

Q Did you, to this date, bring any criminal court summons against Mr. Bailey for assault?

A No, I didn't.

Q How long have you known Mr. Kaswan? Approximately.

A Oh, about close to seven years.

Q Does he work in the same field as you do? Yes or no.

A He works in some fields that are related. We do not have a business relationship however. Our relationship is a social one and we do discuss business as people who have peripheral interests in common.

Q Now, what time did the nurse come into the room, if you remember and ask you to leave the hospital?

A I believe it was approximately ten minutes to nine.

Q Okay. Had you seen anything in the lobby at all stating, in red and white letters, that the visiting hours are elevan AM to 8 PM?

A I don't at this point recall what the visiting hours were. I do not specifically recall, at this point in time, I do not recall seeing any such thing. I may have seen such a thing. I don't know. I was aware certainly that there was a limit to visiting hours and I can only say that, you know, in the course of conversation, we got very involved and I didn't notice the time, which I might have questioned otherwise.

But until the nurse did come - there was no other notification by the way.

Q The nurse notified you that it was past visiting hours, did she not?

A That's correct.

Q Did Mr. Kaswan say to you, I believe you testified, I'm going to go with you to make sure you have no problems getting out?

A Right. To explain my presence there because I was merely a visitor. I was not, I had nothing to do with the VA. I had nothing to do with the hospital. I was not a patient there or anything of the sort.

Q So I take it you knew also that it was past visiting hours?

A Well the nurse came in and told us that.

Q I mean, he said, no problems getting out. It was a reference to the fact that it was past the visiting hours.

Cross - Schwartz

A That's correct.

Q Did you go down by elevator?

A Yes, we did.

Q Now, when you came off of the elevator - excuse me. Was there morethan one elevator? If you recall.

A I don't quite understand ---

Q When you got off the elevator, sir, is it correct tosay that that was not off into the lobby?

A No, there was a bank of elevators and this was one of the bank.

Q Is it correct to say, sir, that there is a hall from the bank of elevators which leads to the lobby?

A That is correct.

Q And in order to get to the lobby from the bank of elevators, you would have to go down this hall. Is that correct?

A That is correct.

Q All right. Now, do you recall, sir, whether there was a rope and any signs in thishall at the point where the hall comes to the bank of elevators? Yes or no. If you don't you don't.

A There were not.

Q That's your testimony, sir. There were not.

A There were not.

A There was a rope within the lobby, separating essentially the body of the lobby from a small passageway left in front of the desk where people come in.

Q I'm not referring to that sir.

A That's the only rope that I saw.

Q I'm referring to this hall that leads from the elevators to the lobby.

A There was no rope there.

Q Now, if you recall ---

A If there had been, I would have noticed it because Mr. Kaswan in the wheelchair could not have gotten by very easily without the rope being removed. There was no rope.

Q There was no rope at the point of the hall going into the lobby.

A No place other than within the lobby itself as I just explained.

Q All right. You're absolutely sure of that.

A Well, absolutely sure that we passed no rpoe because Mr. Kaswan, as I said, was in a wheelchair and wouldn't have been able to get by it without moving the rope.

Q Do you recall how wide that hallway was, leading into the lobby from the elevators?

A I'd have to make a wild guass.

Q About 8 or 9 feet in width. Does that sound about right?

A Probably something of that order.

Q And the length of it between the elevators and the lobby, would that be about 15 or 20 feet? Roughly.

A It was short. I would guess probably even less than 15 or 20 feet.

Q What would you guess?

A Probably half - probably ten feet is perhaps more like it. Twelve feet. Something along that order.

Q Now did you see at any point in the hall, you state you saw no rope. Is that correct?

A That's correct.

Q Did you see any sign stating lobby closed, use other eixt or words to that effect with an arrow? Do you recall that?

A No. I certainly do not recall. If there had been, I certainly would have followed the directions.

Q And you're sure that neither you nor Mr. Kaswan, the man in the wheelchair passed any rope barriers. Is that correct?

A That is correct.

Q Now, I believe you stated that you wrote a statement that same day.

A The same evening. That is correct.

Q Could it have been on June 7th or did you write another statement dated June 7th?

A I copied the statement over and dated it June 7th which was the date of the meeting ---

Q That's why I'm asking. The statement was dated June 7th and that's the exact same statement that you wrote down that very night?

A Yes.

Q Is that correct?

A MM-hmm.

Q You wrote it that very same night?

A That's correct.

Q Now, I'm going to show you the statement - may I show the photostat - may I have the original statement by itself, of Mr. Kaswan, which is dated June 7th. I'm just going to ask you if that's it, if that's the statement.

HEARING OFFICER MARACHI: You have a copy of it.

MR. LINKER: Yes, I do.

Q I'm going to show you this statement which is six pages long and is dated June 7th and I ask you if that is the one you referred to, the same one that you copied word for word from the one you did on the night of the occurrence, May 14th, 1976?

A I believe it's word for word. I can't swear to it. My intent was to copy it but I do have a habit of editing it - I may have smoothed out the writing somewhat.

Q Right.

A I edit as I right.

Q Do you have the original copy?

A No, I don't.

Q Where is it?

A That I don't know. I may have it at home. I may not. I don't know. Right now - I just moved and everything, all my papers are in a state of confusion. I really don't know.

Q Okay.

A I don't know. I did clear out a bunch of stuff.

MR. PORSETTA: I object to the line of questioning. I think the witness has indicated ---

MR. LINKER: I'm not asking - I just asked him a question, if he had it. The man is talking and I'm not interrupting him.

MR. FORESTTE: Well, I object to the line of questioning.

MR. LINKER: I asked him if he had the statement that he made on the very night. I think that would be germane, but I'm allowing him to answer.

THE WITNESS: I don't know.

Q In all events, you never gave that copy to anybody else, as best as you ——

A No.

Q Not the copy, the original. Just answer yes or no please.

A No, I did not.

Q I see. I just want yes or no answers. I'm not — now, in all events, this copy on June 7th is the one you referred to when you said before, at the conclusion of your direct examination that under oath I will state that everything in there is true and correct. Is that correct sir?

A Yes.

Q That's this copy. But the one you refer to is this one. June 7th.

A Yes.

Q Now, Mr. Schwartz, how far away - strike that. You entered the lobby with Mr. Kaswan through that door. Is that correct sir?

A Yes.

Q And how far into the lobby did you go before you heard the guard say anything or before the guard spoke? If you remember.

A Perhaps about ten feet. What makes it difficult to judge is that point at which the corridor stops and the lobby starts. It's not as definite as it might be.

Q Now, did you, at that time, which was around nine o'clock or slightly after nine o'clock ----

A It was around that time. I don't recall precisely ---

Q Yes sir. Could you see if the lights in the lobby were dimmed or still on? If you remember.

A I believe that the lights at that point were dimmed.

Q Did you see any other visitors in the lobby at that time? If you remember.

A I don't remember seeing any other visitors.

Q Now this lobby is a large lobby with many seats. Is that correct sir? Many seats for visitors. Is that correct. Please answer because the record doesn't show you hsaking your head.

A I think you could say that.

Q And is it correct to say that the desk where this guard was was to your left as you walked out of the hall and toward the exits?

A That's correct.

Q And you were about ten feet in. Is that right?

A I can tell you precisely at what point we were within the lobby. We were right at the, when you go, when you're just approaching and we stopped, we were just approaching the stanchion at the extreme end of the rope that was up in the lobby, dividing the desk area from the seating area.

Q I follow. The rope barrier well into the lobby. Is that what you're saying? Where the desk area and the seating area were.

A If you could give me a piece of paper and a pencil I could draw a ----

Q This roped area which is within from the hall. Is that correct?

A That's correct. You walk into the lobby at this point, approximately ten feet away, perhaps, the first stanchion of the rope barrier. It was set, oh, I don't know, some six feet from the desk, allowing space for people to pass through there, but separating the desk area from the seating area.

Q It's all on the signs, the directions there, sir? Yes or no.

A No, I don't recall seeing anything.

Q Were there any signs posted at the elevator or in the lobby entitled Regulations? Did you ever see that? Yes or no.

A I don't recall.

Q You're sure there is no rope barrier at the entranceway -

HEARING OFFICER MARACHI: I think he's indicated an answer.

MR. LINKER: All right.

HEARING OFFICER MARACHI: At least twice, to my recollection.

Q Now, did you hear what the guard said the first time he spoke?

A No, I did not.

Q Before that, were you and Mr. Kaswan talking to each other? As you came into the lobby, the distance you traveled, before the guard spoke. If you remember.

HEARING OFFICER MARACHI: If you're not sure, Mr. Schwartz.

THE WITNESS: I'm not sure. I just don't remember that.

Q Did you and Mr. Kaswan stop at any time in the lobby before the guard spoke? Do you remember?

A No, we didn't.

Q Did you and Mr. Kaswan stop after the guard spoke?

A Yes, we did.

Q Did you and Mr. Kaswan stop the first time the guard spoke? If you remember.

A As I recall, when the guard first spoke, Mr. Kaswan stoped his sheelchair and swiveled it around, facing towards the guard. He stopped there and turned towards the guard, so I stopped too. I was standing right next to him.

Q Did there come a time when you said anything to the guard during this conversation that he had, the statements he was making to Mr. Kaswan?

A Let me make one correction to what you're saying. There was no indication that the commentary, whatever was being said, that we couldn't hear, was directed at Mr. Kaswan or at me or was directed at both of us. It wasn't a conversation at that point with Mr. Kaswan.

Let me turn it around and say you could hear, he obviously was talking to Mr. Kaswan, up to that point, was the only one who had responded.

Q Did you say anything sir?

A After he said what he did, I ---

Q If you remember.

A Yes. I stated before, I said you had no call to say something like that to this man. You're accusing him of lying?

Q And where was the guard at that time?

A He had turned away from the desk and he was standa few feet from it, oh, I would say, probably ten, maybe 15 feet away from us at that time.

Q Did you say anything else after that or did the guard say anything else?

A Yes, the guard said something after that. He totally ignored what had been said before, and changed the subject and switched to something perhaps a little safer. He said ----

Q I'm going to testify he said to you that you don't beling here at this hour. Is that what he said?

A As far as I can recall, he said, what are you doing here? You're not supposed to be here now. And as he said this, he was walking up towards us rather quickly.

Q Did you say anything?

A What?

Q Did you say anything?

A I didn't have a chance to say anything.

Q Now, during the time that Mr. Bailey was talking you towards the office, did any other guard come and also take your other arm taking you towards the office? If you remember.

A As I stated before, when Mr. Bailey was there, pulling on my arm ----

Q Could we have a yes or no answer. Did any guard take you by the other arm ----

A You have made a misstatement. I cannot give you either a yes or a no answer to it, because neither is relevant.

If you will allow me to correct your statement, I can then give you an answer.

Q The question is, did any otherguard take you by the other arm as you went to the door, to the office?

A The statement is not correct.

Q Would you explain, Mr. Schwartz?

A I'd be happy to. I - when Mr. Bailey grabbed my arm and started pulling on it, I stood there. I did not move. Another guard came up and explained to me some of what was happening and basically had an entirely different demeanor and attitude, a much more reasonable one, and he laid his hand on my arm. It was not a question of taking me by the arm.

His action was exceedingly gentle. It was almost a reassurance, a reassuring touch. To put it in terms of I was being taken by Mr. Bailey and another guard took my arm is entirely misleading.

Q Did the other guard go with you and Mr. Bailey into the room?

A Yes, he did.

Q Which side of you was the other guard on? The right or the left.

A The left side. Mr. Bailey was on the right side.

Q When you arrived at the door, leading into the office, was the shade up or down?

A The shade was up.

Q And you went into the office, did you?

A That's correct.

Q And was the shade pulled down?

A Mr. Bailey pulled the shade down.

Q At this point, I'm going to show you a statement. I direct your attention to thetop of page two. First, I ask you if that would lead you to change your testimony as to the rope barrier. This is page one, not page two.

A No. That in no way conflicts with what I've told you. We were at all times, when we entered the lobby, we headed for the right side of the rope barrier and remained on the right side of the rope barrier.

Q I ask you if you wrote on this statement, on the tope of page two, as Mr. Kaswan and I entered the lobby on the right side of the rope barrier.

A That's correct. We were always to the right side of the rope barrier.

Q Mm-hmm. Now, I ask you if anywhere in your statement, I think it's on page 4 and 5, did you say anything about Mr. Bailey or anyone else pulling down the window shade? Or the - I'm sorry ---

A Would you repeat that?

Q Did you say anywhere in your statement that the window shade was up or anywhere in your statement that Mr. Bailey pulled the window shade down? Did you say that?

A You'll have to give me a few minutes to read through the statement.

Q Sure.

MR. FORSETTA: I don't understand the relevancy of the question. I think he testified that ----

HEARING OFFICER MARACHI: Well, I think here is am importance to the Commission whether the window shade was up or down.

MR. FORSETTA: He testified that the window shade was down. I think he testified that Mr. Bailey pulled down.

HEARING OFFICER MARACHI: I'd like to ask why this is an important question.

MR. LINKER: Sure. On direct testimony he testified that the window shade was down, covering the glass top. Now, maybe I missed it on direct. At this point he says that the shade was up. And Mr. Bailey pulled it down after they went in. The idea of importance is whether or not Mr. Kaswan could see into the room.

THE WITNESS: Well, I didn't write it down.

Nevertheless, I have testified and that is correct.

Q So, at all events, when you were inside the room, the shade was down. Is that correct?

A That is correct. Until the time that Mr. Bailey's right elbow struck it. At which point the shade flew up and the room was completely visible as far as the window and the door would permit.

Q Did - I believe you testified that just before that you had gone to the door, is that correct?

A That's correct.

Q Before you had gone to the door, I believe you testified, you had been sitting at the desk with ---

A No, that's not correct.

Q I believe you testified that before you went to the door, you had been sitting at the ---

A I testified I got up from the desk, where I was sitting. I was getting very fidgety and I just couldn't sit still anymore and I got up and stood for a few minutes and then decided that I ought to let Joe know what was going on and tell him, you know, everything seems to be under control and it's okay for you to go back to bed.

I walked over to the door, speaking to Mr. Bailey, as I walked.

Q And what did you say?

A Something to the effect that I wanted to let my friend know that I'm still here, you know. I'm okay and I was going to continue and tell him why. However, there was no time for that because Mr. Bailey ---

Q You testified - excuse me - you testified that your hand was on the door knob.

A That's correct.

Q Which hand was it - your right hand or your left hand?

A My left hand.

Q And --

A Excuse me. I was half turned ---

Q Did there come a time when you started to turn the door know with your left hand that was on the door knob? If you recall.

A I may have done so simultaneously - I do not - I cannot swear to it at this point in time.

Q At the time when your left hand was on the door knob, were you facing towards the door or in some other direction?

A I was facing in some other direction.

Q Did you hear Mr. Bailey say anything?

A Mr. Bailey said nothing.

Q All right. At the time your left hand was on the door knob ---

A Excuse me. At least as far as I can remember. I don't remember him saying anything.

Q At the time your left hand was on the door knob, in which direction were you facing?

A I was standing, facing the direction approximately parallel with the door ---

Q Facing to the right or left, as you faced the door going out.

A If I was facing the door, the way I was facing would have been to the right.

Q There's a wall to the right.

A Someplace around there, yes.

Q To the right of the door, there's a wall ---

A I'm not sure how close to the door. Someplace there is a wall.

Q That wall extends back into the room, back to where the desk was, where you were seated at one time.

A That's correct.

Q About how far back from the door is the desk where you had been seated at one time with Mr. Bailey?

A Maybe ten feet, twelve feet. Something like that.

Q Right. And is it correct to say that the last time, you saw Mr. Bailey before you commenced walking to the

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door, he was at that desk? Is that correct to say?

A Before I started walking to the door, he was at the desk?

Q Yes.

A That's correct.

Q And then you walked to the door. Is bat correct sir.

A Mm-hmm.

Q How far did you walk, if you recall, because I don't recall where you said you were standing?

A I'm not sure of that precise spot I was standing in.

Q Were you near the desk?

A It was not far from the desk certainly. It was, I may have been on the other side of the desk closer to the door. I don't know precisely.

Q You walked somewhere under ten feet and more than five feet? Something like that. Ten feet being the distance from the door to the desk.

A I took two or three steps. Speaking as I walked.

Q Yes. Now when Mr. Bailey approached you, cameup to you, did he come from the desk area towards you? From the desk towards you or did he come from some other direction?

A No. It was from the desk.

Q It would have to be from the desk?

A That's correct.

Q And were you in the position you testified to, with your left hand on the door and looking to the right when he reached you? Is that correct sir?

A At the point that he reached me I was looking straight ahead.

Q Straight ahead in which direction? To the door or back to the desk?

A Niether.

Q To the wall on the right?

A Correct.

Q I follow you. That's what I asked.

A Yes.

Q So at the point - did you hear him coming toward you since you stated he said nothing, did you hear him coming towards you? If you remember.

A I'm sure I did.

Q Did you say anything, if you remember?

A I was talking at the time, as I told you. As I was walking up to the door. You see, it's difficult to know, to pin down these precise moments in time because they were simultaneous actions going on.

Q Well, will you try, Mr. Schwartz.

A I was speaking as I moved towards the door, telling him that I wanted to speak to my friend Joe and let him know ----

Q You were still the process of that conversation ----

A I was doing that. Mr. Bailey jumped up from the desk. This all happened simultaneously. You can't say I did this, then he did something else and I just stood there and nothing happened while he did something else. These things happened simultaneously.

Q But when he reached you and before he pulled back his arm and strike you, did he say aything at that time? After he reached you.

A I believe he did, at that point.

Q Do you remember what he saidat that point?

A Oh, yes. Only very hazily. I cannot remember the precise words. Something to the effect of no, I shouldn't open the door or something like that. I don't know remember precisely what ----

Q It happened simultaneously.

A That was when he reached the door. Up to that point he had said nothing.

Q When he reached you, you were at the door, so when he reached - were you still at the door in the position you said you were?

A Of course.

Q Did any time elapse before he struck you?

A He said something and my response to that was I started to try to explain to him. You know, this is ridiculous. I want to tell my friend and I never got to say more than a couple of words when he struck me.

A All right. So there was some brief conver - statement ---

A It was not even a conversation. I not sonner got the two or through words of the sentence out of my mouth when he hauled off and hit me. Therewas no conversation.

Q Did you turn to face him before he hit you?

A He was facing me.

Q He put himself between you and the wall?

A Correct. Right in frontof the door. He was standing right in front of the door. I was slightly, if you're facing in that room, from the back of the room, facing towards the desk, my relative position was ---

Q Facing towards the door.

A Facing towards the door. I was just to the left of the door. He was directly in front of the door. He was standing right ---

Q He was between you and the desk when he came up from behind you.

A He wasn't in that direction.

Q You said your left hand was on the knob of the door.

A The door knob. That's corect.

Q And you were facing to the right, looking towards the wall on your right. Is that correct?

A I was facing towards that wall as he, as I ---

Q I'm just asking if that's true what you said before.

A As he came up I turned my head slightly to the, to my right ---

Q To your right. To the direction he was coming from. Is that correct?

A That's correct.

Q Because at some point you observed him coming.

A That's correct.

Q All right. You turned to the right.

A Slightly to the right. You know, this is not a question of precise geometry. It's a question of a few degrees ---

Q To the right, which is in the direction Mr. Bailey was coming. Is that correct?

A That's correct.

Q And is it them that he struck you sir?

A No, it is not.

Q All right.

A It wasn't - he reached the door. He said something like, no, you get your hand off that door. Something of that I don't remember now precisely what. If you want to know, you can look in the statement I made. I'm sure I say something about it.

Something to the effect of no, you don't. Get your hand off that door and at that point, I opened my mouth. I started to say something. I had no more than gotten two or three words out to, in an attempt to explain to him, that, you know, that I wasn't acting capriciously. I was making no attempt to escape ---

Q Where were you, sir? Where were you then when you were strick at the door?

A I was standing right by the door.

MR. FORSETTA: I object to this line of questioning. I think if the physical plan is so important that we ought to adjourn to the hospital. We can look at the area and can physically demonstrate where he was, etc. We're dealing with feet. We're dealing with inaccuracies. This is important and critical. I think we ought to adjourn to the hospital, so he can show exactly what transpired at that time.

HEARING OFFICER MARACHI: I have no problem with Mr. Schwartz' explanation of the facts up to this point. Now, I think ---

MR. LINKER: I just want to know where he was standing at the time he was struck.

THE WITNESS: Would you like me to draw a diagram.

MR. LINKER: I don't want a diagram. I just want to know where the man was standing at the time he says he was strick.

HEARING OFFICER MARACHI: All right. Now, I think you've heard the question.

MR. LINKER: Excuse me. Up to now, the only place he's said he was standing was, you know, facing the wall with his left hand on it.

HEARING OFFICER MARACHI: Mr. Liner, if you please. When Mr. Bailey reached you, did he place himself between you and the door?

THE WITNESS: No, not previsely. We were face to face. I was to the left of the door, facing halfway at that point, facing directly towards him. He was halfway, you might say, between me and the door. He was - but - here met me try ---

HEARING OFFICER MARACHI: Let me ask you this. It's all right.

THE WITNESS: I'd like to try and show you. Maybe that will help you.

MR. LINKER: We want testimony. That's facts.

THE WITNESS: All right, let me try and show you. Then perhaps we can reduce this to berbalization.

MR. LINKER: No, I would rather have testimony

THE WITNESS: At that point, I was standing like this. He was standing directly in front of the door, right in front of me, but he was not precisely between me and the door, because I was not directly opposite the door. I was off - here was where the door knob is, and I was standing right here.

HEARING OFFICER MARACHI: Right.

Q Yes sir. To the right - the door was still closed sir.

A If you face from the back of the room, I was to the left of the door.

Q I asked you if the door was still closed sir?

HEARING OFFICER MARACHI: Apparently it was since he's indicated ---

A Yes. The door was still closed.

Q You were to the right of the door as you faced the door from the back. Is that what you're saying now?

HEARING OFFICER MARACHI: No, he's saying to the left.

A I was to the left of the door.

Q No, as you face the door from the back, he was to the left of the door.

A That's correct.

Q Just to clarify, was the door know, as you face the door, on the right of the left?

A On the left.

Q You were on the right of the door?

A No, I was on the left.

Q I'm sorry. On the left of the door, on the other side of the door knob.

A Correct.

Q And where was Mr. Bailey?

A He was in front of the door on the other side of be door know from me.

HEARING OFFICER MARACHI: Directly in front of you. Is this correct?

THE WITNESS: Well, I was standing. If this is the door and this is the door knob right here, I was standing like this and he was right over shere.

HEARING OFFICER MARACHI: So he was facing you.

THE WITNESS. Correct.

HEARING OFFICER MARACHI: Okay.

EXAMINATION BY MR. LINKER: (Continuing)

Q Is it correct to say that you were both perpendicular to the door?

A Not precisely. Slightly, somewhat at an angle. Again, we can't say perpendicular or facing - it's only a question of degrees.

Q At that point, were you both the samedistance from the door, or where one of the other of you further away from the door, if you remember?

HEARINGOFFICER MARACHI: I think the witness had adequately explained the events up to this point. I don't know if getting into the, you know, very precise details, you know, it - I've permitted you a great deal of leeway. I think we've set the stage. Now, I think the questioning has gone a little too far.

Continue.

MR. LINKER: If you direct me to stop, I will.

HEARING OFFICER MARACHI: I know. I'm not directing you to stop. I am saying though that when you try to get too precise with some of these things ----

MR. LINKER: But this is the only charge agaist Mr. Bailey. I do want to question him.

HEARING OFFICER MARACHI: That is why I've given you estensive leeway. Continue.

MR. LINKER: Thank you.

Q Now, did Mr. Bailey ever change from that position at any time before you were struck?

A It happened so fast there was hardly time for any change of position.

Q I ask again - I take it then that your answer is he did not change his position from that position before you were struck.

A That's correct.

Q Thank you.

A Basically that's correct. I don't know, I can't swear that he didn't move his body five degrees or ten degrees. There was no substantial movement certainly.

Q Was your hand still on the door knob when you were struck? If you remember.

A At this point, I really, I don't recall.

Q Do you recall whether it was the right side of the jaw or the left side of the jaw on which you were struck?

A It was almost in the center. Just a matter of a fraction of an inch, maybe half an inch to three-quarter of an inch to the right side, of the center. It was right about over hre, you know. It couldn't have been more than three-quarters of an inch off center.

Q Now, the door, of course, and the window shade was to your left. Is that correct?

A That's correct.

Q And that would be to Mr. Bailey's right. Is that correct sir?

A That is correct.

Q Now you say, is it correct, I believe you testified that when he pulled back his fist - strike that. With which arm did he strike you - his right one or his left?

A Obviously with his right.

Q We want to make sure of that. With his right. Some people are lefties. It was his right?

A Right. Definitely.

Q All right sir. Now, did he - I believe yousaid you were a boxer. Did he use a hook or a job when he sttuck you. Was it a short punch or a long punch? You know, if you can characterize it from your experience as a boxer.

A It was more a right cross.

Q A right cross. And was it in one motion that he did it or when you say his hand struck the shade, did his hand stop at the shade?

A Well, from a physical standpoint, if there was a change of direction, it had to stop even if only for a microsecond, but there was no perceptible stopping.

Q I believe you testified already you did not fall down, did you?

A No, I did not.

Q I believe that you testified that you then returned to the desk with Mr. Bailey. Did any other guard come into the room at or about that time?

A I don't recall at this point. They may have, they may well have. I wouldn't be at all surprised if somebody did, because I'm sure, you know, it was observed. But I right now —

Q Do you recall?

A Right now, today, I don't recall. I may have mentioned something in the statement, but right now, I couldn't say.

Q Did you notice whether the shade on the window went back down after you returned with Mr. Bailey? If you remember.

A That's a curious point. I do have arecollection of it being pulled down again. I don't recall who pulled it down or when. But I'm pretty sure it was pulled down again. I just don't remember the precise details of that.

Q Now - excuse me one moment. Excuse me. Just to be sure, there was nobody else inside the room at the time you say you were being struck? At the time you were struck.

A There was nobody else in be room.

Q You're sure of that.

A I'm sure.

Q Did you hear anyone say anything at the time you were being struck? If you remember.

A I don't recall anyone saying anything at the time. I know Mr. Bailey did not say anything at the time and nobody else was in the room at the time. I doubt I could have heard anything said outside. As far as I can recall there was nothing said.

Q Did you speak to that guard that had gone into the room with you and Mr. Bailey at any time after the striking?

A I really at this point just don't remember.

Q Do you remember if you spoke to any other guard at any time after the striking?

A Sir, as I say, I just don't remember.

Q I understand. That's why I'm asking.

A There were two other guards - the one that had at first come up and then a second one and I don't recall now whether or not I spoke to either of them afterwards. I'm sorry. I can't help you there.

Q When you left the hospital, do you recall what time it was?

A At this point, I would be rather hard pressed to say. I would guess it was somewheres around ten. That's a pretty vague recollection.

Q Did you leave directly after you got the summons or within a short time after that?

A Yes.

Q Now, where did you leave from, that is to say, the main entrance?

A The main entrance.

Q Was that opened for you by any guard?

A I don't recall.

Q It could have been opened by some other guard.

A It may have been. I don't recall.

Q Now getting back to the shade for a moment. You said that it went up when Mr. Bailey's elbow struck it. Did it snap up immediately?

A Yes.

Q Did it snap up all the way immediately?

A Yes.

Q Did it hit the top and turn?

A Yes. Excuse me. I do recall for some reason, very vividly it was a very sharp snap. Very tightly wound

A 66

spring.

Q Tightly wound spring?

A Yes.

Q Did you notice that window covered about half of the door?

A It was just the ---

Q The top half.

A The top half. Yes, that's correct.

Q Now, the original statement which you wrote that night ---

A May I correct you, if I may?

A Yes.

A I went home and I made notes about it, as I recollect. I did not write it up at that point, because I made complete notes, but not putting it into sentence form or anything of that sort. It was perhaps the next day or be day after that I wrote it as a statement. But that night - I do want to correct it - that night what I wrote was notes, you know, notes ofacomplete run through of the events.

Q Do you have the notes or the statement with you?

A No, I don't have either with me. I will be happy to look for it. I hope it didn't get thrown out.

Q Would you see if you could find it and bring it in?

A I'll give it a try.

Q Yes. Now, when was the first time ——

HEARING OFFICER MARACHI: I'm sorry, Mr. Linker. I think he's - the witness has indicated that these notes ——

MR. LINKER: Yes. There were no notes mentioned before sir.

HEARING OFFICER MARACHI: Well, but I think he's indicated that the statement that he subsequently gave in June was covered essentially the same area ——

THE WITNESS: Precise[illegible] same area.

HEARING OFFICER MARACHI: ~~I--~~ has a copy of the notes and I'm not going to keep the record open for an indefinite period of time, you know, waiting some notes that are identical or are allegedly identical to what is already in the record at this point.

THE WITNESS: May I just comment that there is no substantative difference. What I did and what this reflects is merely the putting into English, into complete sentences and making a connected marrative rather than having a sequence of statements of events.

BY MR. LINKER: (Continuing)

Q Did you - when for the first time, if at all, when did you report what happened - the incident that night - to anybody in the VA Hospital, if at all?

Or did there come a time when you were asked to come to the VA Hospital?

A My recollection was I spoke to my friend, Joe, the following day. He called me up. He may have said something that night - I think he did - I don't recall - that he was going to get in touch with me. He called me up and said to let him carry the ball, that he wanted to file a formal complaint with the VA - I should say - with the hospital - so I said fine and he did so.

And my first contact with them was, if I remember correctly, was a telephone call from them.

Q And then you went, and then there came a time when you went to the VA?

A That's correct. They asked us to come down.

Q And did you bring the summonses with you at that time? The two summonses.

A I don't remember. When they first called me, they told me that the summonses were voided.

Q When they first called you up.

A That's correct.

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Q And was that before —— ce.

A This was before the June The

Was it June 14th?

Q June 3rd. The accident, i

14th, so the meeting was June 3. Che

A I don't remember the date of

Q Well, your statement is dated

would refresh you. The meeting was befo ur statement. It was June - the statement is dated June 7th. You made your new statement after the meeting.

MR. FORSETTA: I think the record gives a fiarly clear picture of events.

A At the meeting ——

Q The statement is dated June 7th and the meeting was before the statement.

A My recollection is that at the meeting, I believe that I mentioned ——

Q All right. The date of the meeting please?

A I don't recall - I do not recall the date of the meeting.

Q All right, but you're sure it was before the meeting that you were called on the phone by someone from the VA and you were told that the summonses had been voided.

A That si correct.

Q Do you recall who it was that spoke to you?

Was it anyone that was at the meeting?

A To the best of my recollection, it was not anyone who was at the meeting. It was a lady who called me on the phone, perhaps a secretary or an administrative assistant. I don't know precisely whom.

Q That meeting that you then went to, was it the only meeting until now?

A That's correct.

Q HEARING OFFICER MARACHI: All right, Mr. Linker. Do you have any further questions of this witness.

MR. LINKER: Do I have any more questions, yes. Yes, I do, sir.

HEARING OFFICER MARACHI: All right. Then proceed.

MR. LINKER: Yes, I am.

Q And who was present at that meeting, if you recall? Yourself, Mr. Kaswan was present, I take it, and two gentlemen from the Veteran's Administration.

A There was a gentlemen from the Veteran's Administraton. I don't recall his name or his title. He was, I think, I don't think he was the administrator. He was the Assistant --

Q Mr. "Brogan".

A Mr. Brogan, that's the man's name. Mr. Si

Q Mr. Siley was there, the Chief of Police.

A The Chief of the Security Force was present. The gentleman who is outside right now.

Q Did you bring your original statement with you to that meeting?

A No, I didn't.

Q Did you tell them at any time during that meeting that you had a statement?

A I think that - I don't recall precisely what I said. I believe that I did tell them at that point that I had completely documented, I had complete notes - at least I would imagine I told them that. I don't recall just how the conversation went. But they did say that they would like me to write a complete statement and I said that that would certainly be no problem.

I had complete notes, you know, on it.

Q Did you tell them you had a complete statement already at home?

MR. FORSETTA: I object. I don't understand the relevancy of the question.

HEARING OFFICER MARACHI: Will you respond to that?

MR. LINKER: Yes, I want to know if he was asked to bring a statement, why did he not tell them already that he had a full statement and would give them rather than to make a statement which shows obviously that he had no statement prior to that.

His whole testimony about this statement - this statement was made obviously after the meeting on June 3rd, dated June 7th and that's the first time he wrote the statement.

HEARING OFFICER MA[illegible]: I think the witness has indicated that he doesn't recall whether he did or did not tell them that. Part of the objection is what relevance is, you know, the further questions in this area have to do with the charges against the appellant.

MR. LINKER: Sure. If the man has an original statement and goes to the extent of making a new statement thereafter it may be that the original statement contains strong items in it which are contradictory of the statements of theentire prosecution and that's why I'm trying to see if we can have this man go home and see if he can find that original statement, which he knows says he didn't make that night, that he took from his notes a few days later and wrote out and I'd like to see that statement.

HEARING OFFICER MARACHI: All right. Hold it Mr. linker, because when two individuals speak it's not going to come out on this verbatim transcript. Let's try and ascertain exactly for the record what the story is.

You indicated you had made notes the evening of the incident?

THE WITNESS: That's correct.

HEARING OFFICER MARACHI: Did you then, shortly thereafter put these into a written format?

THE WITNESS: I put these into a written format.

HEARING OFFICER MARACHI: And the statement you subsequently submitted on or about June 7th, that was pretty much ---

THE WITNESS: That was substantively the same. What I added to it was, and I can tell you the claim thing. For instance, at the beginning, what I was doing at the hospital. That I was there to visit my friend, Mr. Kaswan, which wasn't - I kept this record for my own purposes.

HEARING OFFICER MARACHI: All right. And you're indicating from this point, ----

THE WITNESS: From my own recollection ---

HEARING OFFICER MARACHI: You're indicating at this point that you're uncertain as to whether this prior statement, if you want to call it that, characerize it as such, is available of whether you still have ---

THE WITNESS: I don't know. Unfortunately, I moved last week and if this had been two weeks, I could say definitely. I'm sure I had it then. But I did a lot of cleaning out, you know, of papers and stuff and in the process of moving. I don't know whether this is something that I still have around. Everything is in rather a state of confusion.

It will take me some time to go through it. It will take me some time - but I'll be happy to do it if it will be of any use to you.

HEARING OFFICER MARACHI: All right - I think - let's go off record.

(Whereupon a discussion was held off the record.)

HEARING OFFICER MARACHI: During the off record period, we had a brief discussion with counsel for the appellant as to concerning this alleged prior statement that had been made by Mr. Schwartz. Mr. Schwartz indicated that it was undated, to the best of his recollection and that he is uncertain as to whether he could find it at this point.

Whereas there is no way to determine the date of this statement, we will not request the witness to seek it out and submit it at this point. All right, Mr. Linker would you continue with your examination.

Q At that meeting, Mr. Bailey was not present.

A That meeting?

Q The one - ----

A I don't believe he was.

Q You never really saw Mr. Bailey between the night of May 14th, that this happened and today? Is that correct?

A As far as I know, that is correct.

Q Now during the time before Mr. Bailey took you into the office, before you and Mr. Bailey went into the office, die Mr. Bailey tell you that you were not supposed to be in the lobby and ask you to leave?

A As I told you before, he ---

Q Hold on.

HEARING OFFICER MARACHI: I think he's responded already, to the qu3stion of what took place prior.

A Well, let me respond please. He did say that I had no right to be there. He did not tell me to leave. At no time did he tell me to leave. He, as a matter of fact, prevented me from leaving, physically, by grabbing me by the arm and rather than asking me to leave, he told me he was going to give me summonses.

Q And you're absolutely sure he did not tell you to leave?

A I am absolutely sure of that.

Q When he asked you to produce your ID card, you did not produce it in direct response to ---

HEARING OFFICER MARACHI: Again, counsel, I think we've covered this area adequately. Do you have anything further?

MR. LINKER: No further questions.

HEARING OFFICER MARACHI: All right. Mr. Forsetta, do you have anything further?

MR. FORSETTA: Yes, I have just a few points I'd like Mr. Schwartz to clarify.

MR. LINKER: I object to that, Your Honor.

HEARING OFFICER MARACHI: I don't see - let's go on.

REDIRECT EXAMINATION

BY MR. FORSETTA:

Q Let's get to the lobby, Mr. Schwartz, and the question of barriers. Would you say that the these are barriers or lane guides?

A This is a lane guide. It's similar to the types they use in banks or movie houses to, you know, direct people. It consists of stanchions, metal stanchions with a some sort of a rope between the stanchions to, essentially to demarcate areas.

In this case it was between the desk area and the siting area of the lobby.

Q Would you say that the stanchion was separating people entering and people leaving?

A I would say yes. It separated people ente ring from people either leaving or waiting in the lobby.

Q So you're being to the right would mean that you were leaving possibly?

A That's correct.

Q OKAY AND THERE WAS NO BARRIER ACROSS THAT from prohibiting you from leaving?

A No. This was essentially parallel, you know, to our ---

HEARING OFFICER MARACHI: Again, I think the witness has responded to this question on several prior occasions.

MR. FORSETTA: That's all I have.

HEARING OFFICER MARACHI: All right. Mr. Linker, do you have anything further?

MR. LINKER: No sir.

HEARING OFFICER MARACHI: All right, there being no further questions of you, Mr. Schwartz, I'd like to thank you for coming down to testify and I'd like to ask you not to discuss your testimony in this hearing room today. Thank you.

THE WITNESS: Excuse me. Does that mean at all? I mean can I talk about it with my friends, but I mean after - not before he testified certainly. I understand that, but ---

HEARING OFFICER MARACHI: I have no objection to you speaking to your friends.

THE WITNESS: Fine. That's what I meant.

HEARING OFFICER MARACHI: When the trial is over. Thank your, Mr. Schwartz. We'll limit it to that.

(Whereupon the witness was excused and left the room.)

HEARING OFFICER MARACHI: All right, Mr. Forsetta, do you want to proceed with your next witness?

MR. BAILEY: Can we take about a five-minute recess? Go to the bathroom. Have a drink.

HEARING OFFICER MARACHI: All right, but don't talk about the case. I'll walk you. You're going to need a key for the men's room.

(Whereupon a recess was taken.)

HEARING OFFICER MARACHI: We're on again. I'll identify myself. My name is Dennis Marachi and I'm the Civil Service Hearing Examiner in this case. I think you know Mr. Forsetta, the agency representative. The gentlemen immediately to my left is Mr. Bailey, the appellant, and to his left, is Mr. Linker, his attorney.

It's customary at these hearings for all testimony to be taken under oath? Do you have any objections.

MR. KASWAN: No.

HEARING OFFICER MARACHI: Fine. Would you raise your right hand? Do you solemnly swear that the s testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you god?

MR. KASWAN: I do.

JOSEPH KASWAN

HEARING OFFICER MARACHI: All right. Would you state your full name and you are not an employee of the agency, so would you just indicate your occupation.

THE WITNESS: All right. My name is Joseph Kaswan, K-A-S-W-A-N, and I'm self employed and the nature of my work is I work in the area of combustion processes and my work is, as my business card says, design, engineering, manufacture and installation.

HEARING OFFICER MARACHI: All right. Mr. Forsetta, would you like to begin the examination of the witness.

DIRECT EXAMINATION

BY MR. FORSETTA:

Q Mr. Kaswan, would you please indicate what transpired the evening of May 14th at the hospital?

A I wrote it up immediately after it happened. I went up to my ward and wrote it up so that I would be refershing my memory at the time. Now, I do have what I wrote up with me. Would you mind if I read it?

MR. FORSETTA: If there is any objection to that? We have your statement.

THE WITNESS: Oh, you have. Well, it's essentially the same thing.

HEARING OFFICER MARACHI: Iis it essentially the same statement as the one you subsequently submitted?

TH[illegible]ITNESS: Right.

HEARING OFFICER MARACHI: All right. Since this issue came up earlier with the prior witness, Mr. Linker, do you want to see this. Do you want to see a copy of these alleged notes? Or this alleged statement made at the time of the incident.

MR. LINKER: I have the copy right here. It's part of the record. But I would like Mr. Kaswan to testify.

THE WITNESS: But would you mind if I refresh my memory?

MR. LINKER: Well, if you state on the record that you don't remember it, then I haveno objections to your refreshing your memory, but if you do remember it, I would like you to testify. That's up to you.

THE WITNESS: I'll say it as well as I can and I'm subject to correction then. In other words, my memory is as good as it is.

MR. LINKER: That's up to you, Mr. Kaswan.

THE WITNESS: Okay. I'll state what I remember subject to correction.

HEARING OFFICER MARACHI: All right.

A On the night, I think the 14th of May, Harold Schwartz, a friend of mine visited me in the hospital, where I was a patient. I was still pretty weak and he was concerned about my state. I wasjust operated on a few days before and because he was concerned, he stayed. I guess we lost track of time, andhe stayed later than he should.

When the nurse came in and told us that he was over-staying, I said well, it's difficult for me but I'll get into a wheelchair and go down with you, which I did. We had to wait a little bit for the elevator and we got down. I believe we got down to the lobby about five to nine.

As we were going towards the door, the layout of the lobby is such that the path towards the door is divided - it's a revolving door. It's divided in half by a rope supported on posts, a rope barrier, in effect. A single rope separating incoming from outgoing. I believe that's what it does.

We were facing the door. We were on the right side of the door with Mr. Schwartz maybe a couple of feet ahead of me and again the layout of the lobby is such that everything to my right constituted the larger part, the seating area of the lobby and on the left is a desk - proceeding in the direction that I'm facing was an open desk with space behind it and then a continuation of the desk with a glassed in area with windows, and I guess that's where a receptionist and what have you - whatever it's for.

And as we were going towards the door, there was someone - I guess it was Mr. Bailey - I didn't know who he was, his back was to me - he was in uniform - said something. Now I didn't hear. I didn't hear it because I have a service-connected loss of hearing.

So I said, I'm sorry. I didn't hear you. And he said something again. And I still didn't hear him. So, I said, I'm sorry. I still didn't hear you. And he turned around and he said, loudly this time, you heard me. You only hear what you want to hear.

Now, this is, all right - I wan't give you any impressions. I was just offended at the time but Mr. Schwartz is a friend of mine, and as I indicated at your request, what I do, the nature of my work, Mr. Schwartz is also an engineer, so that when we have conversations, our conversation - they're not idele conversations. They're about specific technical things, subject matter.

So that our conversation - we have to understand what each other is talking about, so that because conversations are not idels, when I can't hear him I tell him so and he's gotten to know me over theperiod of four or five years and to know that if he wants to be hear, to stand on my right hand side and so he knows the nature of my hearing problem.

And because he knows, when this was said to me, that I hear only what I want to hear, he knows that that's not true, because he's had experience with me otherwise. And so, he also knew that I was immediately post-operative and I was in a weakneed condition. It was difficult enough for me as it was to get into a wheel chair and come down, so on my behalf, he said to Mr. Bailey something to the effect of - I don't remember the exact interchange - something to be effect of he told you the truth.

He said, what he said was true. Whatright do you have to insult him, what right do you have to say that he's lieing or call him a liar. Something to that - I don't remember exactly. And Mr. Bailey said, I didn't call him a liar. There was an interchange there, then Mr. Bailey rushed over.

Now, Mr. Schwartz spoke, I guess, in an angry voice on my behalf. Mr. Bailey got equally angry, rushing over towards mr. Schwartz. Now, I don't remember exactly. There was about a one-minute period there in which this whole thing started and I don't understand why, I never have understood why, but all of a sudden, Mr. Bailey had hold of Mr. Schwartz and he was pulling him and Mr. Schwartz tried to resist and the more Mr. Schwartz tried to resist, the more Mr. Bailey pulled and eventually - they were shouting at one another by this time - eventually - I was sitting there stunned - Mr. Schwartz was dragged back of the rope barrier and I made, I turned my wheelchair in order to keep up with them.

I couldn't participate in anything, but just to keep up, rolling the wheelchair, and as I recall, because Mr. Bailey was having some difficulty pulling Mr. Schwartz back, he started calling for other guards. And I saw other guards come in and by that time, Mr. Bailey had Mr. Schwartz behind the desk and it seemed to me at that time that he had him behind the desk and I felt that's where they were going to stay and I kept telling him, I started saying and I kept saying, this is a wrong thing to do. This shouldn't be happening. Why are you doing this. Leave him alone. He hasn't done anything.

And I kept saying the same thing and other guards came up and I thought maybe I could have an influence with them. I said, why don't you put a stop to this. This is a wrong thing to behappening. This should not be happening. And they said, well, we don't know what it's about. Let's go and find out. About that time, I saw that Mr. Schwartz was disappearing from view. He was being taken into another room.

And words were being, you know, harsh words or harsha expression or harsh tones were being said to one another about that time and it was out of my earshot then. Maybe because they were both talking at the same time. Certainly it was loud enough for me to hear, but I couldn't distinguish, you know, what either one was saying.

And so, of course, one guard came in and another guard came in and I don't recall exactly, I think possibly a third. And they came in and came out. I said, can't you fellows put a stop to this. There's something wrong here. This should not be happening. And I kept saying the same thing.

And then the door closed. I know that Mr. Bailey and Mr. Schwartz were inside. I don't know if there was another guard in there when the door was closed. The door closed and very shortly after the door closed - excuse me -- the door has about the upper half of the door set within the framework of the door is glass and it was clear, so the door was closed, but I could see through it. Then the shade was pulleddown and my view was blocked.

I got very angry because there was no raeson to isolate him that way. And I was very disturbed and I said something to the same effect to the guard that was outside, one of the guards that was outside. Then, all of a sudden, the shade flew up and I saw Mr. Bailey with his back to me, swing his arm forward and I saw his hand strike Mr. Schwartz' face.

And of course my agitation over this thing continued and I couldn't do anything. Mr. Schwartz didn't come out and Mr. Bailey didn't come out. A couple of the guard went in and they came out. For god's sake, what's the matter with you guys? Can't something be done to stop this? And one of the guards, I don't remember which one, because, you know, I never saw them before or after, so I couldn't pinpoint him exactly.

So they said well, let's try to see what we can do but there is nothing much we can do. He's our boss. He;s the supervisor at night. And I said, you know, so, I just sat there and waited and I stewed and waited until finally, about 9:30, I think, Mr. Schwartz came out and he came out and he had two summonses for federal court. I don't remember exactly what the summonses were for.

But I was absolutely appalled because it seemed to me a fantastic combination of something that never should have started. And I said to my friend, all right, now, I'll just support you in ever way I can, because I know that this was a wrong thing. I'm going to go upstairs right now and write it exactly as it happened, which is what I did and you have a copy of what I wrote. You have the times.

HEARING OFFICER MARACHI: All right. Mr. Forsetta, do you have anything further?

MR. FORSETTA: Just one clarification

Q Where were you sitting when this transpired, when you witnessed this?

A Well, I was sitting on the lobby side of the desk. Because when I had gone as far as I could with the wheelchair and all I could get to was the end of the desk, facing the door. Cause I turned around when Mr. Schwartz came back. I turned him around and followed him. I backed up the wheelchair because I couldn't go any further.

Q You were really facing the door and had clear sight to the window.

A Yeah, because my view inside was blocked. First the door was closed, then the shade was pulled down. Cause I was looking right at the window.

Q Just another point of clarification. How large would you say that window was?

A Well, the full width of the door, minus the space of the wood frame.

Q 3 x 3? 2x4? Just an approximation.

A Well, about 3x3, I would say.

MR. FORSETTA: I have no further questions.

HEARING OFFICER MARACHI: All right. Mr. Linker, would you like to cross examine the witness?

CROSS EXAMINATION

BY MR. LINKER:

Q You say that he was in there an inordinate length of time? How long a period of time was he in there?

A About half an hour.

Q And you said when he came out, he showed you two summonses. I believe you said you were appalled by the summonses. Did he tell you what they were for?

A He did, but I don't recall. I think one was - let's see if I can recall. One, I think ---

Q Maybe I can help you. This is a copy.

A Yes. Right.

HEARING OFFICER MARACHI: Would you indicate for the record what was shown to the witness?

MR. LINKER: One was personal failure to depart premises by unauthorized persons.

Q There's no question ---

HEARING OFFICER MARACHI: Will you indicate for the record the document you made reference to?

MR. LINKER: Yes. I made reference to the document that's attached to therecord and that's the front part of the summonses, the front part of Mr. Bailey's report - it's a uniform offense report which is a report of the two summonses that were given and part of the record.

HEARING OFFICER MARACHI: All right.

THE WITNESS: I didn't see those at all.

Q There's no question that Mr. Schwartz was there past visiting hours?

A Well, I don't know that he was there at 9:30 certainly, but he was kept there until 9:30. My recollection is ---

Q Excuse me. The nurse told you back upstairs, it was past the visiting hours.

A Right.

Q And there's no question that it was past the visiting hours?

A Well, no. All right. Was it worth a summons? How many people do you go in and visit and you're four or five minutes late. Do you give everyone a summons? What's visiting hours to that extent. Is it a federal offense the minute the nurse says visiting hours are over.

Q Well, you know from the signs that visiting hours are from 11 AM to 8 PM. I'm sorry, from 11 AM to 8 PM. And you were in thehospital ---

A We were told about 8:30.

Q Did you ever notice the signs all over the lobby, saying 11 to 8?

A No, because I was in bed. I'm not around the signs.

Q As a mater of fact, you went down with Mr. Schwartz so that there would be no trouble for him to leave ---

A --So they wouldn't think he was just somebody wandering around.

Q Right.

A That he was visiting a patient.

Q The reason you went down was because it was past --

A Right. We recognized it.

Q Did you go down the elevator?

A Yes.

Q And did, do you recall about what time it was when you got down to the lobby?

A Yes. I'm sure we got down about five to nine.

Q When you left the elevator - does the elevator enter right into the lobby?

A No.

Q There's a hallway going from the elevator bank to the lobby. Is that correct?

A That's right. This entrance that rope barrier goes past a bank of telephone on the right and then around a wall and then to the right and there the elevator is. Two banks of elevators face that space.

Q Yes.

A So you have to make a turn.

Q Now, have you ever been down in the lobby at any time before that, after 8 o'clock, after visiting hours?

A No.

Q This was the only time.

A Yes.

Q Okay. On this occasion, this time, on May 14th, did you see any rope barriers across the hallway leading from the elevator, you know, blocking the hall which would be into the lobby?

A I'm not sure I understand.

Q Did you see a rope barrier ---

A The one simply going from the entrance in and out.

Q how about - was there any rope barrier across the hall with a sign ---

Q You mean where the banks are?

A Yes. With a sign ---

A No.

Q For persons to use a different exit.

A No. I had clear access with my wheelchair.

Q You didn't remove any rope barrier and go through it?

A No. There was a clear passage.

Q You didn't say any sign that said go to another exit?

A No.

Q You're sure you didn't.

A Yes. We had clear passage. I remember that.

Q You were, as you testified, in a weakened condition from the post-surgery. Isn't it true that you should not have left the room?

A No.

Q Isn't there directions, Mr. Kaswan, that patients aren't supposed to go down to the lobby after 8 o'clock or even any time when you're post surgery?

A No. I don't remember any instructions like that in the first place and in the second place, I was not that knowledgeable because I came in excruciating pain and I went through an operation and I was still in a weakened condition, so about the only that I had my head together one was just holding it together. I wasn't ---

Q Did you zsk anybody, a nurse or anybody to accompany you down to the lobby?

A No.

Q Couldn't something have happened to you physically from the exertion?

A No, as long as I wasn in the wheelchair. Nothing could happen to me in the wheelchair except thatI would run out of steam and just rest for a while. My leg was operated on.

Q Now, do you recall when you went into the lobby, with Mr. Schwartz, whether or not you were talking to him as you went into the lobby?

A My recollectin is that generally the conversation is easy - sometimes we do, sometimes we don't. He'll make a remark, something about things that we're interested in ---

Q Do you recall at that time. I'm talking about May 14th. When you went into the lobby, whether you were talking. I'm not talking about the other times.

A Well, I'm saying that thenature of how it would be would be characteristic of anytime we were casually strolling together. Sometimes, it's a brief conversation.

Q Do you remember?

A I don't remember.

Q You don't remember if you were or not?

A It might be or itmight not be.

Q Do you recall if either of you stopped at any point as you were going out?

A No.

Q Now, how far away from the guard were you when you first hear d anything being said by him?

A Well, directly opposite - simply the width of the rope barrier, as it separates from the counter. We were moving through the adjacent rope barrier ---

Q Could you tell us approximately how many feet you were?

A I czn only judge right now from the aspect as I'm entering the hospital and how it looks to me as a passageway and it's an ample passage way without getting crowded.

Q Could you estimate in feet?

A I would say about six feet.

Q Now you stated you did not hear what he said. Correct?

A Excuse me. The nature of my hearing loss is nerve deafness. Nerve deafness you can hear sound but you cannot distinguish the words.

Q I should have corrected myself - you could not make out what he said.

A That's right.

Q Now was he facing you or was his back ---

A No. He was doing work on the windows. I think he was lowering them or something.

Q All right. So his back was to you. But he said something.

A Something.

Q Okay. You did not know what it was. Correct?

A That's right. Frequently, I understand that people don't know so I apologize for not hearing and I ask them to repeat it.

Q Did you know - his back to you, did you know whether he was addressing himself to you or to Mr. Schwartz?

A I assumed to both of us.

Q There was no way you could tell whether he was talking to you or to Mr. Schwartz or to both of you. Is that correct?

A That's correct. I had no way of knowing.

Q And, of course ---

A We were the only ones there.

Q Of course, there's no way you could tell if he was asking Mr. Schwartz what he was doing there at that time. Now, he could have been asking.him.

A Yes sir.

Q So the subject of trespassing by Mr. Schwartz could have been raised in that first conversation. Thereis no way you can tell either way is there?

A No, but this was still ---

Q I'd like ---

A Yeah, right. I couldn't have told. I couldn't have known. But there was somebody else sitting in the corner of the lobby there.

Q Yes, when you entered the lobby, were the lights lowered?

A Yes.

Q They were lowered.

A Right.

Q Now, that's ----

A There were no other visitors.

Q There were no other visitors.

A I'm sorry. There wasn't a general state of visitation but there was one man sitting in the corner near the exit in one of the chairs - only one man.

Q Was he a visitor or a patient?

A It seemed to me ---

Q There were no patients there?

A No, he wasn't a patient.

Q And no other visitors except the man?

A That's right.

Q During the day, of course, there's dozens and dozens of people.

A It's an interchange. People come and go. Visitors sit there. Patients sit there.

Q You don't know if the door already leading out were locked, did you?

A No, we were told they were locked at 9 o'clock and this was 5 to 9. That's what the nurse told us.

Q Oh. That same day.

A That night.

Q The nurse upstairs?

A That's why we made it a point to get down there.

Q Isn't it a fact that it was already 9 o'clock when you started down?

A No, not when we started down.

Q Yes sir. When you got into your wheelchair to start down. It was already 9 o'clock. Isn't that right?

A Is that what I said here?

MR. FORSETTA: I think he's leading the witness. Let the witness answer.

THE WITNESS: If I say that here, it's okay.

MR. LINKER: I'm saying ---

THE WITNESS: Okay.

HEARING OFFICER MARACHI: You wrote that the same night.

MR. LINKER: It was already 9 o'clock.

THE WITNESS: I said subject to correction.

MR. LINKER: Right.

Q You say that the nurse told you that 9 o'clock they locked the doors, right up there with Schwartz present?

A Right.

Q Now, didn't you see any signs at all as you went down that said lobby closed? Did you ever see such a sign at any time?

A I was never there except as a patients.

Q Right. Well, excuse me a minute. I just want to get one other ---

A May I say something at this point?

Q I just want to ask - I'm trying - one minute. Now, I believe you said that after you responded to Mr. Schwartz about your hearing loss. I believe you said, I'm sorry. I didn't hear you.

A Right.

Q That there was an interchange between him and Mr. Schwartz and Mr. Schwartz with an angry voice on your behalf and Mr. Bailey spoke back.

A The interchange started when Mr. Schwartz said, he can't hear. Why do you call him a liar? Now, may I say ---

Q I'd rather ask questions.

A All right.

Q I mean you'll have a chance to say - how long a period of time did that interchange between the two of them, I'm talking about the two of them, angry voices in the lobby, while they were still out in the lobby, last?

A I would say about a minute or two. I said so before.

Q About a minute or two, by the watch?

A Well, according to my sense of time.

Q Yes. Were you able to hear what they were saying then?

A The beginnings of it were that Mr. Schwartz said, why did you call him a liar, you know and he said that in an angry voice and then Mr. Bailey turned around and rushed toward Mr. Schwartz and grabbed him and he said something like what are you doing here.

But not until Mr. Schwartz said, why did you call him a liar. At that point, Mr. Bailey said what are you doing here, but not before.

Q Well, you didn't hear what he said before.

A But he kept working.

Q Yes.

A He said something, but he kept working. But it was only after Mr. Schwartz said, why are you calling him a liar that he rushed towards him ---

Q And sais what are you doing here?

A That's right. He tried to grab him then, but only then.

Q Is that when the two-minute interchange started --

A It was during this time. During this time. This is part of what bothered me. It wasn't until Mr. Schwartz tried to defend me that it became an issue - his being late.

Q Now, did you hear Mr. Bailey tell him that he was going to come with Mr. Bailey and he was going to give him a summons? Did you hear that?

A No.

Q Did you see another guard come and go with - no I mean when they walked to the office. Did you see another guard come and go with Mr. Bailey and Mr. Schwartz into the office with him on one side, holding one arm of Mr. Schwartz, as well as Mr. Bailey holding the other?

A Mr. Bailey and Mr. Schwartz were struggling and I said eventually another guard came up and helped Mr. Bailey to take Mr. Schwartz in behind the counter and I, about that time, I don't recall ---

Q No, no. I'm just asking - he was held by a guard.

A There wasanother guard. Mr. Bailey was held by another guard.

Q when they went into the office, another guard went in with them ---

A I don't recall exactly. I can't say.

Q How long were they in the office altogether?

A They stayed in there ---

Q At 9:37 by my watch they came out.

A Oh, okay.

Q About how long were they in there?

A This mean, I said about half an hour. This means I'm off by seven minutes.

Q They could have gone in seven after.

A Well, this interchange - at 9 o'clock we started down and we got down say about 9:05, so I'm off by ---

Q You're right on it.

A Yeah, okay.

Q So it was about half an hour.

A Half an hour. That's right. It's pretty close. Within a minute or two.

Q Inside the office?

A That's right.

Q And after you wee in, how long after they were in did you see the shade go up. How long did you have to wiat before the shade went up?

A Well, I don't recall just how long they were in there before the door was closed. That's the problem. It's not a question for me of how long they were in there before the shade went up but how long after the door was closed because the closing of the door still didn't obstruct my view.

And then the shade was pulled down and it seemed to me that the shade was pulled down because it was realized that I was outside as a witness looking in and I could say what I saw and if somebody wanted to keep my view out ----

Q How long after they went in was the shade pulled down?

A How long after the door was closed, cause I don't remember how long after they went in the door was closed. I don't remember.

Q Was it a half hour?

A It couldn't have beena half hour. They were out in a half hour.

Q That's right. Was it at the beginning or the end?

A Oh, let me think now. Within ten minutes after they went in. Eventually the door was opened.

Q In your statement, at the bottom of the page, in one sentence, the guard forced my friend into a room behind the counter and closed the door with a glass window in it. It sounds as if he closed it when he went in.

A Well that doesn't fix it as indicating that he closed it at the same time. In other words, he took him. I didn't say how long after, he closed it. But I didn't say how long after.

Q Well, how long was it?

A Within ten minutes the door was closed. And then the shade was still up and I could see through. But then the shade was drawn down within two minutes after the door was closed.

Q Right.

A But again, within two minutes, that shade flew up.

Q Right. And you saw ---

A And I saw Mr. Bailey's arm this way, moveforward that way and I saw his fist strike Mr. Schwartz' face.

Q Right. Now then the shade went down and you remained there.

A That's right.

Q For how long a period of time went by - I believe you said you were telling guards ---

A Yes. Guards were coming in and they were stopping to ask me what's happening here and you know, I kept telling them ---

Q For how long a period?

A About fifteen or twenty minutes.

Q Whopulled down the shade Mr. Kaswan?

A I believe it was Mr. Bailey. Now, I don't recall if there was nother guard in there, so it could have been another guard pulling it down.

Q Did he pull down the shade both times?

A No. Only one time - oh, twice. I'm sorry. After it flew up, it was pulled back down again. So whoever it was in there, I believe, it was Mr. Bailey who pulled it down, but it could have been another guard. I don't know.

Q At the time the shade - excuse me. At the time the shade went back up and yousaw him strike him, did you se if any other guards were inside?

A I just said, I don't know.

Q Were there any other guards standing with you outside?

A Oh yes.

Q Outside.

A I believe there were one or two guards standing outside but then as I said, I wasn't certain about a third one so there may have been a third one.

Q Where were they standing? Next to you?

A Well, just know of not in a rotted position, you know. One would be standing here and they'd walk around here. There was no fixed position that I could pin down. But generally around the end of that desk. Either in front of it or behind it, you know.

Q Well, I'll show you this page of your statement. You have it in front of you and if you want to use that, it's okay. And it appears to me, I ask you if there is any statement there that any guards were there at the time of the alleged striking?

A Yeah, they were there ---

Q No, I mean the statement doesn't look like that does it?

A Well. Well, there had to be one. One helped mr. Bailey bring my friend in, so there had to be --

Q No, this is after he was already in. I mean, at the time of the striking, which you said was about ten minutes or so after they went in ---

A Oh yes. Guards were there. Yeah. They came out. They went in again. They came out again. They were circulating in and out. Because I don't know what other reason ---

Q At the time of the striking, were there any other guards standing with you?

A Well, I don't recall whether they wree just standing with me. Some walked away elsewhere and came back. So it was a whole circulating thing and I can't recall any ---

Q Excuse me. Where you talking to any guard at the timeof the striking?

A No.

Q Did you say anything to any guard at the time of the striking?

A No.

Q Did you remain in the same place after the striking?

A Yes. That's why the shade was pulled down again. Yes sir.

Q Did you hear anything that was said inside?

A No, I couldn't hear once the door was closed.

Q Were you able to see Mr. Schwartz at the time of the strike?

A Yes.

Q Was he, I believe you said, you know, correct me if I'm wrong, you said Mr. Bailey's back was to you as you looked through the glass. Didn't you say - No, I'm just asking if you said Mr. Bailey's ---

A That's right.

Q Back was to you.

A That's right. But he didn't block out the view of the whole room.

Q I didn't say that.

A Sir, I'm just trying to clarify.

Q But you said Mr. Bailey's back was to you.

A That's right.

Q At the time the shade went up, you saw him.

A That's right.

Q Was Mr. Kaswan further ---

A I'm Mr. Kaswan.

Q I beg your pardon, Mr. Kaswzn. I don't know why - Mr. Schwartz, your good friend Mr. Schwartz, was he facing toward you?

A That's right.

Q Was he further inside the room than Mr. Bailey?

A Yes.

Q Were you able to see Mr. Bailey's face at any time?

A No, his back was to me.

Q Before, just before the - excuse me a second - I know that - I'm sorry - just before the shade went up, did you see the door open or start to open at all?

A No.

Q Were you able to see the door knob?

A No.

Q You didn't see the door knob turn at all?

A No.

Q Did you see - Mr. Bailey - swing his arm forward, that is away from you, toward Mr. Schwartz?

A Well - ----

Q Did you see where he connected?

A Yes.

Q Right.

A When he connected.

Q When and where?

A Not exactly, because his fist covered Mr. Schwartz' face, from my view.

Q Did you see what ----

A Face.

Q No.

A I don't know what portion.

Q Was it is right ---

A I can't - it was Mr. Bailey's right hand, sir.

Q That's what I meant.

A Mr. Bailey's right hand. Yes.

Q Right.

A Right arm, and right hand.

Q Right. Now, you say his elbow ---

A Was in this position.

Q And by this position, is it fair to say you're saying that his arm was riased to shoulder level and to the right of him?

A That's right.

Q Mr. Bailey?

A That's right.

Q And it came forward in a round motion?

A Straight motion.

Q Would it show how it came forward?

A Straight, forward motion.

Q That's right.

Q On the right side of Mr. Bailey?

A That's right.

Q Straight forward.

A Straight out.

Q Did it hit on the left side or the xright side of Mr. Schwartz' face? If you know.

A I couldn't see where it landed on his face, but I could see Mr. Schwartz' head past Mr. Bailey.

Q Yes.

A On Mr. Bailey's right side. So it seemed to me that, well, it could have struck anyplace. It could have struck anyplace. I don't know. But I could see Mr. Schwartz on Mr. Bailey's right.

Q Did you see Mr. Schwartz fall down?

A I couldn't see - Mr. B iley's - the rest of Mr. Bailey's torso was there in the way.

Q After Mr. Schwartz came out, did he leave the hospital?

A Yes.

Q And do you recall whether or not he left by the front exit? Whether or not the doors were opened for him? To leave by a guard.

A I don't recall.

Q Do you recall if Mr. Schwartz - well, Mr. Schwartz did not go for medical treatment in the hospital, did he?

A No. There were no doctors available then.

Q No, I mean, did he go, did he go for any doctor for treatment?

A I don't know.

Q Did you hear him ask any guard for medical treatment? Did you hear him?

A No. I thought he wanted to get out of there as soon as he could. He wanted no further trouble.

Q Did you see any bleeding on his face?

A No.

Q Did you see anything wrong with his face?

A No.

Q Did he say anything to you about that?

A No.

Q Did he - show you the summonses, I think you said.

He showed you the summonses.

A Yes, he had two.

Q By the way, while he was inside, I know that you couldn't hear what was being said, but did you hear anything about iedntification cards at any time? Even when another guard went in or anything like that, anything about identification cards?

And when you saw the summons, I believe your testimony way, you were aboslutely appalled and you said, Harold, I will support you any way I can. Is that correct sir?

And it was after that that you went upstairs and wrote the statement? When you went backupstairs at or after 9:37 ---

A Right.

Q Did you use the elevator sir?

A Yes, I had to.

Q When you wheeled yourself back to the elevators, did you see a rope barrier in thehall ---

A I don't remember.

Q Blocking the elevators, no, blocking people from going from the lobby to the elevator or conversely, stopping people leaving the elevator and going to the lobby at that time? Which signs - saying lobby closed and an arrow pointing elsewhere/

A I said I don't know.

Q Well, at this time, you don't remember. Could there have been sir?

MR. FORSETTA: I object to that.

MR. LINKER: I asked could there have been.

THE WITNESS: There could have been and I may not have noticed them, but I can answer discreetly that way because I was very upset over this incident that happened so that other things in my way I would just have discounted.

In other words, my thoughts were not simply taking in the scenerey. I had other things in mind at the time.

Q I have to ask you, when you went back - all I can ask you is was it there?

A I can't answer. I don't remember know because I was upset about something else and I may not have noticed. It could have been, that's right.

Q I know you said that you hadn't been down in the lobby any other night, but had you ever seen a sign down there saying, lobby closed. Use other exits?

A No.

Q When did you first report the incident?

A I don't recall the day. I went down to the office of the Administrative, the administrator. I don't remember the date.

Q Did you give them your statement at that time? Or did you just report it verbally ---

A Well, I wasn't given access to the administrator. I was deflected by a secretary and my recollection is -----

Q I'm not trying to trick you into answering, but the reason I'm asking is because the meeting you had on June 3 with Mr. Schwartz, yourself and the other two reflects that you then gave your written statement to them at that time. That's why I'm asking. Is that correct sir?

A That's right.

Q You did not give the written statement to them or the VA until June 3, 1976.

A That's right. I was discharged from the hospital, to my recollection, on the 24th or thereabouts but I had been there in the Director's office ---

Q Yes, I know ---

A A couple of times and I couldn't get to see the Director and I was defected by secretaries. She asked me what it was about and I said I didn't think it was the kind ofsubject matter - I said I can tell you what it is, but I don't think I should make a statement to you directly because that would come oout simply as off-hand commentary.

I want to make a direct, clear statement rather than just a comment. I think I should ----

Q Well, the record reflects that you did make an oral, verbal complaint ---

A To the secretary.

Q From the - yes. That weekend or the Monday, May 17th.

A Right.

Q Did you mention ---

A I mentioned this but I assumed that there would have to be a more formal follow up. I was never called during the time that I was in the hospital. No one came up to see me.

Q How did it come about that you and Mr. Schwartz arrived on June 3 at the hospital for the one meeting, I believe, that was held?

A After the discharge. Ithink Iwent up at amy request. We went up at my request because he had these two summonses imminent and Ithought that it was a wrong thing to happen. For him to have to go to court and have this kind of thing on the record.

Q Do you recall when you, I mean, you were there June 3, but did you go there any time before to set up that meeting?

A No. Listen, by June 3, I was post-operative and by

June 3, I was still spending all my time in bed except for getting up and going out for meals. I was not all that ambulatory. We went down by taxi because I was on crutches at the time.

Q When you went in on June 3, you had a meeting with yourself, Mr. Schwartz, and two people from the VA. The Assistant Director and the Chief of Hospital Police. Did Mr. Schwartz bring the violations with him - the summonses with him?

A I don't remember. I don't think so.

Q Was Mr. Bailey brought in at any time during that meeting?

A No.

Q As a matter of fact, you hadnt met Mr. Bailey until today?

A That's right.

Q Just one moment please. When you made the oral complaint, the verbal complaint, not the written one which was given June 3, but the verbal one, May 17 or before, was that when - you mentioned within that period of time the fact that Mr. Schwartz had been struck by Mr. Bailey?

If you recall?

A I don't recall.

Q You don't?

A I don't recall. It was verbal and my impression at the time was that I was telling this to someone who was simply going [illegible]ass the message along in order to set up a meeting with the Assistant Director and therefore that what Itold her wasreally not of that much consequence, simply as introductory material to open the subject formally.

So I didn't think that it was important.

Q Well, now, I don't know the answer but did you give Mr. Bailey's name at that time?

A I didn'tknow it.

Q Right. Right. You did not know his name.

A No.

Q Now, did you speak to anyone else to report the incident at the VA. To anyone else at the VA - I'm not trying to say any friend - anyone at the VA between that time and the time of your meeting wherein you gave them Bailey's name?

A No.

Q But at the meeting of June 3, of course, when at the end you gave your written statement, which you'd given the night of the accident, you, of course, mentioned who it was ---

A We were told who it was. That the man was the Supervisor of the Night or the Head of the Night Crew.

Q When were you told it? At the meeting.

A Yes, it was at the meeting and I don't recall now but I think that Mr. Bailey's signature appeared on the summons, so Mr. Schwartz may have known it.

Q That's right. But - as you say - it's correct to say, is it not, that there is nothing in your statement which puts ---

A I didn't know his name.

Q Forth the name Bailey at all.

A Right. I didn't know his name.

Q This is important please. Not you - and there was no way that on May 17th or before back then, when you reported it that you could have or did give the name of Bailey or identify him?

A No.

Q Is that correct?

A I could identify him visually. That's all.

Q All right, sir. Yes. And you never had that opportunity?

A That's right.

Q All right, sir. Thank you very much.

HEARING OFFICER MARACHI: Mr. Forsetta, do you have anything further?

MR. FORSETTA: No further questions.

HEARING OFFICER MARACHI: All right, there being no further questions of you, Mr. Kaswan, I thank you for having come down and testified. I'd like to ask you not to discuss your testimony at this hearing until at least the close of the hearing.

THE WITNESS: Right. I'll probably go out and get some lunch now. Is that what you're going to do?

HEARING OFFICER MARACHI: Yes, we're going to recess. Let's recess for lunch at this point.

THE WITNESS: Do you want us to stay?

HEARING OFFICER MARACHI: Do you fell you'll need them?

MR. LINKER: Well, why don't you have lunch and just come back at 2 and I'll make the decision then. If you don't mind.

HEARING OFFICER MARACHI: Okay, let's recess.

(Whereupon a recess for lunch was taken.)

HEARING OFFICER MARACHI: We're back on the record. Mr. Forsetta, would you like to proceed with your next witness?

Will you sit right there. Let me identify myself. My name is Dennis Marachi. I'm the Civil

Service Hearing Officer. I think you know Mr. Forsetta and the gentleman immediately to my left, Mr. Bailey, the appellant, the gentleman to his left, is Mr. Linker, his attorney an this action.

It's customary at these hearings for all testimony to be taken under oath. Do you have any objections?

MR. PARKER: No.

HEARING OFFICER MARQCHI: All right. Would you raise your right hand? Do you solemnly swear that the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you god?

MR. PARKER: I do.

WILLIAM PARKER

having been duly sworn, testified as follows:

HEARING OFFICER MARACHI: All right. State your full name and positio title for the record.

THE WITNESS: William Oscar Parker, Hospital Police Officer, VA Hospital.

HEARING OFFICER MARACHI: Okay. Mr. Forsetta would you like to begin the examination of the witness?

DIRECT EXAMINATION

BY MR. FORSETTA:

Q Mr. Parker, will you please indicate your version of what transpired the evening of May 14th, between Mr. Schwartz and Officer Bailey?

A Well, about five to 9,Bailey sent me to secure door 824. When I came back down to the lobby in the elevator, I heard someshouting. So, I went to the lobby and I seen Bailey and I guess Mr. Schwartz and they were talking. All right. So Bailey was telling him that he should have been out of the hospital because 8 o'clock visiting hour is over.

So at the time, they kept on talking and kept on talking. So then I stepped in between them. I said, well, okay, it's been done.

Q Could you hold it one second please. I'm trying to find ----- Okay.

A So I told them, after Bailey explained it to him.

Q Excuse me please. I didn't want to hear what the witness said. After Bailey explained ----

A Could I have my statement to read from?

Q Well, slow down. I think you're going very fast.

HEARING OFFICER MARACHI: I want the record to reflecteverything that you say. You're going very fast. There is no problem in what you said. Just slow down.

A All right. So they were talking. So Bailey kept telling him. I said, okay. You told him now. So let him go. So Mr. Schwartz turned to leave, he was on his way out, and he said something. I don't know what he said, but anyway he said something, Bailey went up to him and started talking to him again.

Then Bailey asked him to come inside the security office. And he said he would not because he didn't do nothing. So Bailey took him and escorted him to the office.

Q He took him, you mean he put his hands on his person.

Q You know, when generally if a guy resists, if he offers you resistance, you take him by his arm ---

Q He didn't grab him. He just took him by the arm?

A And just escorted him inside.

Q Okay.

A Again when he got inside, they was talking and shouting. Okay.

MR. LINKER: Was that shouting?

THE WITNESS: Yes. He asked him for his idea card. You know, for identification. So at the time, the patient wanted to talk, so I wanted to see what the patient wanted to talk about. So I opened the door, go talk to the patient, I heard the patient holler, oh my god. He's hitting my friend.

So I said, no. I didn't see him hit your friend. You know. Well then, the patient started hollering, I seenhim hit my friend, I seen him hit my friend. So at this time, in the room behind me, there was a lot of arguing. So I went back in and said, Bailey, and separated Bailey and Mr. Schwartz.

Q Mr. Kaswan the patient indicated, did you see him hit my friend, did you see him hit my friend?

A Right and I said no.

Q And you said no. Then you turned around and walked back into the room.

A Right.

Q Okay. When you turned around, was the door closed?

A Maybe, cause I closed it on the way out.

Q Okay. You closed it on the way out. So you turned around and went back in.

A Right.

Q Okay, now, do you recall if the shade was down or up when you re-entered the room?

A The shade was up.

Q The shade was up when you entered the room. The shade was up. Now when you entered the room, you indicated you separated them.

A Right.

Q Could you clarify what you mean by separate?

A Here is the door.

Q All right. This is the door here.

A No, on this side here. Rgith here. And there is a bulletin board there, right by the Chief's office.

Q Okay.

A They were standing face to face, you know and they were shouting and arguing again, so I stepped between then and Bailey kept asking Mr. Schwartz for his ID, so I turned and asked him for his ID.

Q Were they holding each other? Or were they just in close proximity and talking to each other.

A You know, you could say like face to face, you know, like this here. So I stepped in and pushed in right here. So I say will you please give Officer Bailey your ID? Besaid he would not. So I said, will you give me your ID? So he gave it to me.

And In turn I gave it to Bailey and Bailey wrote out the violation notice.

Q Did Mr. Schwartz when you stepped in to intercede, did he make any reference to the fact that he had been struck by Officer Bailey?

A He was hollering did you see him hit me?

Q Now, that was Mr. ----

A No, Mr. Schwartz. Like I told Mr. Kaswan, I didn't see him hit him.

Q My question to you was, when you entered the room again and separated Mr. Bailey and Mr. Schwartz, did Mr. Schwartz say anything about being struck by Mr. Bailey?

A No, he didn't say nothing. Mr. Kaswan had said it.

Q Mr. Schwartz didn't say, he struck me or anything like that?

A No, he said to me that he would not give his ID to Bailey.

Q Where would you in proximity be Mr. Kaswan, when Mr. Kaswan said did you see him hit my friend.

A Okay. You know this is round like this.

Q Right.

A With door here. So when I came out the door, it was no closer. Facing him, my back turned to the back. I was facing the patient.

Q And Mr. Kaswan was sitting on the other side of the desk?

A No, he was like - I guess the desk is here and he was sitting at the desk like this here. He had his wheelchair drawn like this here.

Q Was he in front of the desk or was he on the side of the desk?

A He was in front of the desk.

Q Okay. In front of the desk. So he was, like you know, in front of you.

A Yes.

Q Okay. Now from a time sequence, when you left the room and you closedthedoor on the way out, when you got out to Mr. Kaswan, that's when he said, did you see him hit my friend?

A No, like, I was going out the door here. I was closing it. So I asked him. I said, what can I do for you now and before I could get that out of my mouth, he said, oh my god, did you see him hit my friend. I said, no, cause my back was turned, you know, causeI'm looking at him. I wouldn't even see it.

Q Well, you were actually closing the door. You had just finished closing the door?

A Well, the door was closed. Liek, you know, it was that much from being closed, you know and I was just holding it like that there and starting to ask him and he said, oh my god, did you see him hit my friend. So I said, no, I didn't.

Q Do you remember if the shade was up or down at this point?

A The shade was up.

HEARING OFFICER MARACHI: Had the shade been down at any pont, as far as you remember?

THE WITNESS: As far as I know, the shade was up.

Q You never saw Officer Bailey hit Mr. Schwartz?

A No, I didn't.

Q How would you characterize the exchange between Mr. Schwartzand Officer Bailey?

A It was heated.

Q It was heated.

A This is why I stepped in and separated then, cause it was heated.

Q Do you have any idea of what time frame, I'm not talking about hours of the day, I'm talking about the period of time that this whole incident lasted. You know, from the time you first got involved untilthe actual alleged physical altercation took place?

A I know when I first got involved it was somewhere between 8:55 and 9 o'clock. By the time it was over, I don't know because I was so involved in everything back to normal, you know. I just didn't know what time it was. But the time

I got involved in it, from the 18th floor to the lobby, it was around 8:55, 9 o'clock.

Q Did, in your earlier statement, you indicated that you initially stepped in between Officer Bailey and Mr. Schwartz.

A Right.

Q Did you feel that was necessary?

A Yes. Because as I said, it washeated. The conversation, you know like it wasn't like it's being carried on now. It was being shouted back and forth. So I stpped in between them, like I told you earlier, and I said, you know, what's done is done. You told him, let him go. Just let him out.

Q And Mr. Schwartz started to leave ---

A Started to leave. Going towards the door. He said something. I couldn't make out what he said.

Q Yes. Was Mr. Kaswan, during this exchange, was he silent or was he talking or do you remember?

A I think it was a question on, you know, we got the ropes they separate the size of the lobby. Right? Like you know the other side, but I can't recall whether he was saying or not.

Q Officer Parker, was the barrier up at that time, to prevent people leaving the elevator from going to the lobby? Had that been put up there? Let me ask you this question. Was therea barrier as you exited the elevator between the elevator earlier in the lobby area to prohibit people from going into the lobby?

A I can't really recall. Because everything was going on, you know. Who could recall that.

Q But you don't remember, as you came off the elevator to go into the lobby, whether or not that barrier was up there?

A No. See, the only thing - when the elevator hit the first floor, I heard shouting. My first reaction was, you know, to look and see what's - you figure an officer is in trouble, so you go to help him. That's my first reaction. So therefore, I didn't pay no attention to what was doing, you know.

Like I wasn't thinking about it. All I was thinking about was going to his assistance, if he was in trouble.

Q Officer Parker, you have participated in training sessions given by the VA for police officer training?

A Right.

Q I have no furher questions.

HEARING OFFICER MARACHI: All right. Mr. Linker would you like to cross examine.

MR. LINKER: Yes sir.

CROSS EXAMINATION

BY MR. LINKER:

Q Officer parker, how long have you worked as a guard at the VA Hospital?

A I'm in my third year.

Q And that night I take it, you were on the night shift? The 4 to 12, whatever theycall it.

A Right.

Q 4 to 12. And you have been on 4 to 12 shifts in that hospital before that night, on many occasions, I assume.

A Correct.

Q And wasn't it standard operating procedure after closing hours, for a rope barrier to be placed at the elevators, and a sign saying lobby closed, an an arrow pointing to the rear exit down that same hall but in the other direction?

A That's correct.

Q And that's done every night, isn't it sir?

d sA Nine o'clock every night.

Q And are the lights lowered at that same time sir?

A That's correct.

Q And are the main doors locked at that time, sir?

A That is correct.

Q And there's regulations posted in the elevator area on the main floor and also inthe lobby regarding people.

Isn't that correct sir?

A What do you mean regarding people?

Q Well, for example, one of those regulations is that patients are not allowed into the lobby after closing hours.

A There is no sign saying that.

Q What is the sign at the elevator? What is the regulation? Would the regulation be 218? or 217? Isn't that correct sir?

A You tell me which one you're asking. I'm not going to answer that.

Q All right, I will ask you. It will take me a second. ----offenses and penalties.

A Yes, that's offenses.

Q No, I'm just asking you, do you know the schedule of offenses posted?

A That's posted all over the hospital.

Q I see. I'm sorry. Yes. And you're familiar with the number 6 thereof, which states, failure to comply with signs of a directive and restrictive nature posted - as one of those? You're familiar with those? You're familiar with No. 8, which is entering into areas which are posted as closed to the public or others (trespass) as a prohibitive thing? Are you familiar with that sir?

Are you familiar with No. 11, which says disorderly conduct which creates louid, boisterous and unusual noise, are you familiar with that one sir?

And No. 12, are you familiar with this one. It says failure to depart premises by unauthorized person. Those are posted all over the hospital. And what are the visiting hours also posted, on large signs, all over the hospital sir?

A They're not on signs all over the hospital. That's on signs when you come into the hospital.

Q Right. What exactly ----

A 11 to 8.

Q Right. 11 AM to 8 PM.

A Right.

HEARING OFFICER MARACHI: Mr. Linker, would you like the document you just made reference to entered into the record?

MR. LINKER: Yes.

MR. FORSETTA: May I see it.

HEARING OFFICER MARACHI: This card that Mr. Linker has just handed to me, is this the card that is posted in various placed in the hospital?

THE WITNESS: Yes.

HEARING OFFICER MARACHI: It's about the same size as this?

THE WITNESS: We have a big ---

HEARING OFFICER MARACHI: A large size.

MR. LINKER: It's the same item, but it's much larger lettering.

HEARING OFFICER MARACHI: How large would you say the lettering was?

THE WITNESS: What? On the posters in the hospital?

HEARING OFFICER MARACHI: Yes.

THE WITNESS: Like you would see posted out here in the front of the building. Somethng like that.

HEARING OFFICER MARACHI: A few inches, the lettering is large enough to be seen at a distance?

THE WITNESS: No. You would have to stand directly in front of it.

HEARING OFFICER MARACHI: All right, Mr. Forsetta, do you have anyobjection to this being entered into the record?

MR. FORSETTA: No, no objection.

HEARING OFFICER MARACHI: All right. Since there are no objections, this will become Hearing Exhibit #1.

(Document referred to above received into evidence and marked Hearing Exhibit #1 for identification.)

HEARING OFFICER MARACHI: All right. Would you continue, Mr. Linker?

Q Mr. Parker, this, your duty and the other Hospital police officers to enfore those rules and rgeulations, is it not sire?

A That is true.

Q And you all have been given powers of arrest and powers to issue summonses and in lieu of arrest for those violations which we just put into the record. Is that correct?

A That's correct.

Q As a matter of fact, that's your job. Is that correct sir?

A That's correct.

Q And as a matter of fact, section 220 on page 4 of the same regulation, which is also posted, but aside from being posted, you're all familiar with section 220enforcement the A part which states, facility of VA police extracts for investigators, but it says presumably VA police will, W-I-L-L enforce the ruls and regulations promulgated herein. Is that correct?

A That's true.

Q That's your directions sir. Mr. Parker, --- you say when you came out of the elevators, of course, your main concern was about an officer, so you didn't notice whether or not there was a barrier, I think you testified?

A I don't recall if there was oneup.

Q No, I'm not getting at that. I mean, when you were at the leevators - you heard what was going on.

A When I got off the elevator.

Q Yes. Did you worry at that time?

A I thought I heard a shot in the lobby.

Q Okay. Now, sir, is it correct that thoseelevators do not open onto the lobby but rather open on to a hallway which leads into the lobby. Isn't that correct sir?

A Well, I was on the corner elevator and it opened here, you can hear anything that is going this way to the end of the lobby or to the exit going out that way.

Q Did you see anyone - I mean when you were getting off the elevator, could you see anybody?

A No.

Q Okay. How long is that hallway which leads from the elevator to the lobby?

A I would say, the elevator is this door here.

Q Yes sir.

A It's not long.

Q Could you tell us how far from the wall in this room? To where you're sitting?

A If this is the elevator that I was in right here, and about this distance here.

HEARING OFFICER MARACHI: So it would be about two feet from your elevator to the corner?

Q To the corner. How long is the hall sir? Not to the hall, but how long is the hall?

A I can't measure the hall.

Q Sir, is it the length of this room or less than the length of this room?

A It's more than the length of this room.

Q Okay. This room is ----

A I'd say from the water fountain down here to this room maybe.

HEARING OFFICER MARACHI: So about 35, 40 feet is the length of the hallways?

THE WITNESS: Could be. I'm not sure.

MR. LINKER: I'll accept that.

Q About how wide is it? About the width of this room?

A A certain part of it, because they have penaling over there.

Q But part of it is about the width of this room?

A Yes.

Q Now, when you - I take it you walked down the hallway, from the elevator to the lobby, or ran.

HEARING OFFICER MARACHI: He stated that he was on the corner elevator, so he wouldn't have had to run down the entire length of the hallway. If I understand the testimony.

MR. LINKER: No, no. He had to run the entire hall to get there. Of the entire 35 to 40 foot hall, he had to run to get into the lobby.

HEARING OFFICER MARACHI: Well, would you let the witness testify.

MR. LINKER: Of course.

HEARING OFFICER MARACHI: Mr. Parker, would you indicate whatthe facts were?

THE WITNESS: When I got off the elevator, and I heard shouting. I ran through the door and I heard the shouting. I immediately I took off ---

HEARING OFFICER MARACHI: You had to run across the entire hallway?

THE WITNESS: Half the hallway, because the entire hallawy reaches from the entrance door down to the path and the eavators's inbetween them. You see what I mean? So it's split in half. It's not much of a run. You can walk there in a second.

HEARING OFFICER MARACHI: I apologize. But we're trying to get our facts. Okay. So, you ran approximately what - 10 or 15 feet and then ---

THE WITNESS: Maybe about ten steps.

HEARING OFFICER MARACHI: Ten steps. Okay. And then you hit the corner at that point?

THE WITNESS: I got off the elevator at the corner. Listen now. I got off the elevator here. Right? It was here. I'm just - you know?

HEARING OFFICER MARACHI: Yeah. Right.

THE WITNESS: Okay. When I got off the elevator, I heard the shouting. As soon as I heard the shouting I took off. And like I said, I got there maybe one second and a half.

HEARING OFFICER MARACHI: Okay. And there was about ten to fifteen feet that you had to cover - the distance you had to cover or rather ten steps.

THE WITNESS: Yeah. Something like that.

HEARING OFFICER MARACHI: Okay. Would you continue please?

BY MR. LINKER: (Continuing)

Q How far into the lobby - when you got to the lobby.

you saw Mr. Bailey and two other gentlemen.

A That's right. They were standing parallel to the - we have a donation box for people who give books - they were standing parallel to that.

Q How far was that from where the hallway begins to go to the elevator?

A About that much.

HEARING OFFICER MARACHI: The witness has indicated about six inches to about a foot and a half.

A Because you see, when you hit that there, you're right into the main lobby, right. It's not that far.

Q When you went, did you run there? Is that it?

A That's right.

Q I'll show you this statement dated June 3rd, and ask you is that's your statement? Is that your statement sir?

A I've got to read it, right?

Q Sorry.

A Yes, it's my statement.

Q Excuse me.

A Yes, that's my statement.

Q When you got off the elevator and heard the shouting, could you make out what was being said?

A All I did was - I hear shouting. I ain't got time for who's saying what. Who's saying nothing. When I hear shouting, my job is to respond. To find out what's going on. I ain't got time to hear what he's saying to him or nothing. Cause if you wait to find out what he's saying, maybe somebody will be hurt.

I justran immeidately for the scene and took the necessary action.

Q You stated in your statement, I saw the argument was becoming heated, so I stepped between Bailey and unknown male. I asked unknown male to lower his voice. Is the unknown male Mr. Schwartz?

A That's true.

Q Was he, when you asked him to lower his voice, washe shouting?

A They both were shouting. But my first objective is to calm Mr. Schwartz down. Once I calm Mr. Schwartz down, I calm Mr. Bailey down. And then we can get to it.

Q I believe you've testified on your direct examination, Mr. Bailey was telling him to leave. Is that correct?

A He was telling him that it was after visiting hours and 9 o'clock, no patients should be in the hospital.

Q How about visitors?

A I mean visitors, not patients. Visitors. Visitors should be out of the hospital by 8 o'clock.

Q Is thattrue sir?

A That's right. 8 o'clock. But there is a tendency toward lateness and they don't leave until 9.

Q Did you see other visitors in the lobby at that time?

A No.

Q Did you notice the condition of the lights in the lobby at that time sir?

A Well, it was ---

Q Dim?

A Dim.

Q That's normal procedure is it too, to dim the lights after visiting hours?

A That's true.

Q Also normal procedure to lock the doors, the exit doors after visiting hours?

A No. At 9 o'clock.

Q At 9 o'clock.

A At 9 o'clock. That's when the stancions, ropes and stuff are supposed to be up.

HEARING OFFICER MARACHI: Let me ask you this. Are the lights dimmed before the doors are locked or are they normally ---

THE WITNESS: Well, after 8 o'clock ---

HEARING OFFICER MARACHI: The lights are ---

THE WITNESS: Dimmed.

HEARING OFFICER MARACHI: Okay.

Q Now, did you, when you went into the room with Mr. Bailey and Mr. Schwartz, when Mr. Bailey took Mr. Schwartz into the office?

A I did.

Q And did you hold Mr. Schwartz by the other arm? When you went into the room? If you recall.

A I don't recall. The only thing I recall is I open the door for him and he went in.

Q You opened the door for him sir?

A Right.

Q Then just the - did you see where they went when they went in?

A Well, they went right by the desk and the typewriter and the bulletin board. When they take somebody inside, that's right where they take him. Right there.

Q They go to the desk?

A Inside the office to the desk. That's where he asked the man for his ID.

Q How far from the door is the desk where they went?

A Maybe the desk is from here to here.

HEARING OFFICER MARACHI: Maybe about 8 feet.

Q And as you walked in, the desk was on your left side?

A It would be to your left.

Q You say you opened the door for them - to go in.

A Right.

Q And they went in and to the desk on the left side. Is that correct?

A Correct.

Q Who closed the door?

A When they went in, I closed the door.

Q And did you go inside with them?

A I was inside the room with them.

Q Did you notice the shade at that time, whether it was up or down?

A The shade is always up. It's always up. If we go to the hospital now, the shade would be up.

Q How about yesterday?

A The shade is always up.

Q But do you remember what it was then?

A Like, I said, it was up.

Q And did you pull it down?

A No, I didn't.

Q Did you see Mr. Bailey pull it down?

A No, I didn't.

Q How long did you remain inside the room?

A Not too long.

Q Did you hear Mr. Bailey - before you left the room, did you hear Mr. Bailey ask Mr. Schwartz for his identification?

A Yes, I did.

Q Not too long after you stepped out. Is that correct?

A The patient was hollering out in the hallway? Right? So I went to see what the patient ---

Q The hallway?

A You know. Outside the doorway. He was hollering. I guesshe wanted to know what was going on inside there. So I went out there to talk to him.

Q He was hollering from outside so you went out to talk to him.

A Right.

Q And was it then that he stated, oh my god, did you see him hit him?

A That's true.

Q Did you look around immediately, sir, through the window which was open?

A I turned around and I saw them. They was together. I went back in and separated them.

Q Did you see anything that resembled a hitting by Mr. Bailey of Mr. Schwartz?

A No, I didn't.

Q Did Mr. Schwartz have his hand to his face like he had been hit or anything?

A I can't recall. All I know was Schwartz was hollering. That's all I know.

Q What were they hollering about now - the ID?

A I don't know what he was hollering about. Schwartz was hollering I haven't done nothing, I haven't done nothing. That's all he kept saying - I haven't done nothing.

Q I show you this statement, this statement and ask you if he's not hollering about the ID at that time? The refusal of Mr. Schwartz to give the ID.

A Oh yeah.

Q Yes?

A I told you that.

Q I know you did. They were hollering about be ID, is that correct sir?

A That's what the whole argument was about.

Q Right and is it correct to say that the argument about the ID wasthat Schwartz refused to give Bailey his ID. Is that correct sir?

A "Could say that".

Q When you went back in this time, did you tell Schwartz to give the ID to Mr. Bailey?

A After I came in, I walked in, they was face to face and I separated them. So I said to Mr. Schwartz, would you please give Officer Bailey your ID card. So he refused. He said no. I said, will you give me your ID card?

Q Okay. Now this was after, this was, of course, right after, directly after Mr. Kaswan had said, on my god, did you see him get hit. Right?

A Right.

Q Okay. Go on.

A So I break in and he refused to give the card. So I said, will you give it to me. He said, yeah, I'll give it to you, cause you haven't done nothing. So he gave me the card and in turn I give it to Bailey.

And I stayed in the room until he wrote out the violation notice.

Q Schwartz said nothing to you about having been hit?

A No.

Q And did you say in the office until Bailey wrote the violation notice?

A This correct.

Q And did he take information from the ID? Is that the procedure?

A That's normal.

Q Do you know if he made out two violation - two summonses notices?

A I don't recall.

Q Right. Where did Mr. LSchwartz stay after you told him Mr. Bailey was writing out the violation notices?

A He was still in the room.

Q Was he sitting down or standing up or both?

A I can't recall.

Q How long did it take for Mr. Bailey to write up the violation notices from the time you went back in the room and got the ID?

A I don't know.

HEARING OFFICER MARACHI: Speak up.

THE WITNESS: Okay. I'm sorry. I don't know.

Q Did you ever see that shade, did you ever see the shade go down or up anytime that night?

A I didn't see it go down. It was always up.

Q After it was over, did you help Mr. Schwartz leave by opening the front door? If you recall.

Q When Bailey finished, I gave him the Id back.

Q You gave him his ID back?

A Yes. Then I think I told him he could leave.

Q Do you know what time it was he left?

A I have no idea.

Q Do you know how he left?

A I think he left by the front door.

Q Do you know if anyone opened the front door for him?

A I can't recall.

Q Now, after that incident on May 14th, 1976, and the time of your statement, which is dated June 3, 1976, 19 days later, did you make any other statement sir? Written statement?

A The statement I made was not written.

Q When, for the first time, were you interviewed about this case?

A I guess the day the statement was taken.

Q June 3, 1976?

A I guess so.

Q Did you ever make any reports about this incident at all before June 3, as best as you recall? I don't have any such statement, but did you?

A No.

Q Did you speak to anybody, in an official capacity, about it? Before you made ---

A Is this my statement?

Q Yes sir. To whom did you make the statement, to Mr. Siley?

A Mr. Siley.

Q That's your Chief?

A Yes.

Q Did you - strike that. Strike that please. So that, is it correctto say, Mr. Parker, that when you arrived in the lobby, at the beginning, Mr. Bailey had told Mr. Schwartz to leave and Mr. Schwartz did not leave.

HEARING OFFICER MARACHI: I don't think that would be a proper summary of his statement. You asked him that question before and he clearly indicated otherwise. There is no way you can read that statement to come out to mean that.

I would at this point ask him specifically what was happening. In your statement, from reading the statement, It would appear that Mr. Schwartz was about to leave when he then said something and then Mr. Bailey went back, qnd at that point, you know, told him to goback to the office with him. Is that what happened?

THE WITNESS: This ic correct.

HEARING OFFICER MARACHI: Mr. Schwartz was on his way out and then made some kind of comment.

THE WITNESS: Right.

HEARING OFFICER MARACHI: You don't recall what his comment was?

THE WITNESS: I don't recall what the comment was.

HEARING OFFICER MARACHI: Okay.

BY MR. LINKER: (Continuing)

Q Now before Mr. Bailey took him into the office, Mr. Bailey asked the man to go to the office and the man refused. Isn't that correct sir?

A Mr. Bailey asked him to and Mr. Schwartz said, for what? What did I do? And Bailey asked him to go in the office and he didn't, so then he took him in the office. He took him in the office.

Q That's normal procedure, sir?

A That's right. When a man refuses.

Q There's no question that he refused to go into the office?

A There's no question. He refused to go.

Q Did he have to use excessive force to bring him into the office? Or did Schwartz more or less comply? I mean did Schwartz resists, when he put his arm on his and said, you're coming with me into the office or words to that effect?

A No, I don't think so. I don't think so.

Q Now, how longhave you known Mr. Bailey?

A All the time I've been working on the job.

Q And did you ever have any problems or trouble with Mr. Bailey yourself, sir?

A Yes. There's been occasions.

Q Occasions when he gave you orders. Is that correct?

A That's true.

HEARING OFFICER MARACHI: When you said you had problems, what kind of problems did you have with Mr. Bailey?

THE WITNESS: Like, youknow, everybody is supposed to do what they're told. But sometimes, you know, if it's a reasonable thing, you know, like in the tunnel where he used to tell me to do things, talk to me like a man. Not a kid. You tell me I better get there. Talk to me. You know. Cause you don't have to argue with me cause you the supervisor.

So don't be arguing with me. If there's something, tell me. But don't walk up to me, you know, lik I'm a kid and like you're my father or something, you know. Then I feel it becomes personal, you know.

HEARING OFFICER MARACHI: This was essentially the extent of the problems you had with Mr. Bailey? The tone, the manner - did it result in anything? Did you have a grievance or anything insofar as the manner in which he spoke to you.

THE WITNESS: No. I just didn't like the way he talked to me.

HEARING OFFICER MARACHI: Did you evernotify Mr. Siley as to your objections?

THE WITNESS: I did.

Q Did you ever present any charges against Mr. Bailey?

You know, you just go in to speak to your boss. You know, you say, listen. the man is on my back. I want you to straighten it out. You know, just like that.

Q In other words, there was no love lost between you and Mr. Bailey?

A You know, like, we weren't friends.

Q Has Mr. Bailey, to your knowledge ever been in any, ever done anything wrong as far as carrying out his work? As a policeofficer during those two years?

A No.

Q You've seen him give out summonses on numerous occasions, haven't you?

A Yes.

Cross - Parker

Q He's given out summonses through the years, many summonses for all kinds of things?

A True.

Q Summonses for disorderly conduct sir?

A True.

Q And any for trespassing, if you recall?

A Well, whatever the situation was, you know, he gave a summons for.

Q And he was promoted to supervisor over you, after you'd both been there about a year. Is that correct?

A Mr. Bailey was on the job before I got there. I was still in the Air Force.

Q Were you, I see. Were you there when he was promoted to supervisor about a year ago?

A I was.

Q And then he became your superior, is that correct, sir?

A That's correct.

Q Sir, about the incident which took place on May 24th, 1976, when two other officers, Carey and "Cutlow" took Mr. Kelley into custody, Mr. Kelley, an engineer, in the engineering department, into custoday and brought him up to Mr. Bailey?

A I was off duty.

Q Did you hear about that one?

MR. FORSETTA: I object to the question.

MR. LINKER: I'm just asking ---

MR. FORSETTA: I'm trying to find out about the relevancy of the question.

MR. LINKER: Well, it's in my response to the charges that were sent in, but you don't know about that.

I have no further questions.

HEARING OFFICER MARACHI: Mr. Forsetta, do you have any further questions?

MR. FORSETTA: Yes, I do have some questions.

REDIRECT EXAMINATION

BY MR. FORSETTA:

Q You responded to the lbby in a rather fast manner. You heardthe shouting on the part of Mr. Schwartz and Officer Bailey. Was there anything about that exchange that concerned you?

A Mr. Bailey was asking Schwartz questions and Schwartz, you know, like kept saying I ain't doing nothing. I had a feeling that the guy didn't want to cooperate and something was going to happen. They were shouting and arguing.

So the main thing was just to stop it. Whatever was going on, just to stop it. And control the situation and that's what I did.

Q As part of your training, you are versed in dealing with patients and dealing with visitors and dealing with people in general.

A True.

Q Qnd how would you describe the demeanor that you're supposed to follow in dealing with people? How are you supposed to carry yourself when dealing with people?

A Well, we're supposed to be courteous, you know, understanding. You know, that sort of stuff.

Q As you witnessed this exchange, how would you characterize Officer Bailey's demeanor.

MR. LINKER: I want to object to this for the record. This is not a charge against Mr. Bailey.

MR. FORSETTA: I think the charge is both verbal and physical abuse against a visitor.

MR. LINKER: No, the only charge is ---

HEARING OFFICER MARACHI: Hold it.

mR LINKER: That he struck Mr. Schwartz.

MR. FORSETTA: I refer you to the letter from Mr. Siley in which there are two charges enumerated.

MR. LINKER: That's not part of your charges, sir.

MR. FORSETTA: The investigation of charges against the police officer to Assistant Hospital Director from the Chief of Engineering through Chief of Engineering, from Chief of Security. We have charge one, Mr. Bailey did verbally abuse and assault visitor Harold Schwartz.

MR. LINKER: Those are not the charges encompassed. The only charges against Mr. Bailey are dated July 2, 1976, which state, notice of proposed removal rather, which was given to Mr. Bailey. It's a notice of proposed removal, dated June 10, 1976. It is the only charge in this case against Mr. Bailey as well as the only thing he's ever been accused of.

MR. FORSETTA: That is not true. If you look at the memorandum from the Hospital Director to Mr. Bailey, it says, subject: reasons I stated in the notice of proposed removal.

MR. LINKER: Which is June 10, 1976. Which only contains one charge against Mr. Bailey.

HEARING OFFICER MARACHI: Wwll, the charge itself is, as I recall, is only oneparagraph. I will permit the question befcause I think it bears upon the setting and what was going on, at that given time and Mr. Bailey has indicated that it was not a charge and it was not to be used that way.

MR. LINKER: May I state sir that I have only prepared evidence to refute the one charge.

HEARING OFFICER MARACHI: As I'm indicating and Iwant this clear on the record, there is only one charge. I will permit the question because I think it does reflect on what washappening on the day of the incident and you know, what may have happened. But only to that extent. Okay. You may repeat your question.

BY MR. FORSETTA: (Continuing)

Q My question was ---

HEARING OFFICER MARACHI: The question related to the demeanor of Officer Bailey at the time that you came off the elevator and saw the, you know, the shouting and so forth.

A Well, in schol they teach you, to not stand and do nothing.

Q It would not be standard to engage in this kind of shouting between a visitor or whatever?

A If a visitor shouts at you, don't you shout at him. Try to control him. Try to settle him down.

Q So when you got there, you felt that, as part of your training, you would attempt to mediate the situation.

A That's right.

Q Now, did you feel, when you asked, you know, you kind of like said let's forget it and you asked this fellow to leave, that it looked like you had mediated the situation?

A I did.

Q And Mr. Schwartz did indeed start to leave and something was said and then you were back in the situation again.

A Correct.

Q How would you characterize this reaction by Officer Bailey?

A His reaction after Mr. Schwartz had made his remark?

Q Yes.

A Well, if it would have been me, I would have just let him keep on going.

Q You would just what?

A I would have let him kept on going. If he was leaving, he was leaving.

Q Do you think the situation was almost over. The guy was ready to leave and then it started again.

A Correct.

Q And at that point, I sensed, you sensed that it was beyond your control to do anything since Mr. Bailey was your supervisor.

A Yes, since Mr. Schwartz made the remark and if he wants to take the man into custody, I cannot prevent that.

Q But you would not have done it, would you?

A Well, no. After I separated the guy, I said go ahead about your business. Go ahead, you know.

RECROSS EXAMINATION

BY MR. LINKER:

Q Mr. Bailey had a perfect right to take the man into custody, did he not?

MR. FORSETTA: He can't ask his question. I'm not finished.

MR. LINKER: I'm sorry.

MR. FORSETTA: I'm not finished.

BY MR. FORSETTA: (Continuing)

Q You had indicated in the cross examination that apparently visitors straggle out of the hospital after 8 o'clock. Is that correct?

A That's true.

Q How are these people usually dealt with, when they straggle through the lobby, let's say between 8 and 9?

A Usually we tell them, you know, visiting hours are over at 8 o'clock. You know. There is no reason for you to be in the hospital at 9 o'clock?

Q You make a point of saying this to these people?

A Yes.

Q Now, you stated earlier, you do not recall breaking any barrier as is normally established.

A No, I don't.

Q And the time frame you're not sure about?

A No.

Q It could have been before nine. It could have been after nine.

A What are you talking about - the time I came out of the elevator?

Q When you came off the elevator.

A It was between 8:55 and 9 o'clock.

Q So it was prior to 9 o'clock.

A Right.

Q In terms of a written account of this occurrence, there's a question about June 3rd, when you were making your first statement. To your memory, did you annotate anything in the guard's log, about this incident? On that evening.

A No. The Supervisor keeps the log.

Q So it would be standard operating procedures for something like this to be annotated in the guard's log?

A Yes.

MR. FORSETTA: That's all.

HEARING OFFICER MARACHI: All right. Let me ask you this.

EXAMINATION BY HEARING OFFICER:

Q Did you have occasion after the incident to speak to Officer Bailey about what happened? After Mr. Schwartz left the building, left the hospital. Did you thereafter speak to Officer Bailey about the whole incident or not?

A No.

Q You did not discuss the matter with him?

A No. Like well that's the way he gave his summonses. You know, that's normal.

Q You didn't do that. All right. Mr. Linker, do you have any questions.

MR. LINKER: Yes.

RECROSS EXAMINATION

BY MR. LINKER:

Q Before the incident happened, you were sent to the 18th floor to open a door for a doctor.. Is that correct?

A That's right.

Q How long were you up there sir? If you recall.

A Maybe about two minutes, maybe about three at the most.

I just opened the door and came right back.

Q The 18th floor?

A Right.

Q Do you recallthat it was about 8:55P M when you went upstairs? According to your statement.

A It was someplace in that time.

Q Do you recall your statement stating that Mr. Bailey was telling the visitor to leave because it was 9 PM, after 9 PM in your statement?

A No, I didn't say that. He was telling the man that visiting hours are over at 9 o'clock. I didn't say after 9. I said over at 9 o'clock.

Q And that the man should leave?

A He should havebeen out of the hospital before this time, because visiting hours are over 8 o'clock, not 9 o'clock. They're over at 8.

HEARING OFFICER MARACHI: You're statement says specifically that he should have been out of the hospital by 8 PM and it was 9 PM.

THE WITNESS: Right.

HEARING OFFICER MARACHI: It was approximately 9 PM. Is that correct?

THE WITNESS: When I got down to the lobby, it was about 8:55 or 9 PM. Cause normally, if I would take a regular elevator up, it would come gack down. But we have our own elevator at night, so we go up and come straight back down.

MR. LINKER: I have no further questions.

HEARING OFFICER MARACHI: All right, Mr. Forsetta, do you have any further questions?

MR. FORSETTA: Just one.

REDIRECT EXAMINATION

BY MR. FORSETTA:

Q The front doors were locked. They were locked at 9 o'clock.

A At 9 o'clock. Somebody takes it and locks it.

Q It's manual, done by 9 o'clock.

A Unless - someone has to take the key and lock it.

Q That door could have been locked before nine or after nine. Is it conceivable? It could have been locked ten after nine, five after nine.

A It depends on who's working.

Q But it is not exact that at 9 o'clock, that door is locked every night? I'm taliing about once in a while he's busy and he doesn't lock the door until ---

A Once in a while, if you're busy, you don't get to lock the door until about ten after nine, fifteen after nine.

Q So it is conceivable that during this exchange the door was never locked at 9 o'clock, since it all happened about 9 o'clock? That's all.

HEARING OFFICER MARACHI: All right. There being no further questions of you, Mr. Parker, I thank you for your testimony and you may be excused. Please don't discuss what you said here at least until after the close of the hearing. Okay?

THE WITNESS: Okay.

(Whereupon the witness was excused and left the room.)

HEARING OFFICER MARACHI: The next witness' name is Siley. Let me identify myself. My name is Dennis Marachi. I'm the Civil Service Hearing Officer. I think you know Mr. Forsetta and Officer Bailey. The gentlemen to his left is Mr. Linker, his attorney.

It's customary at these hearings for all testimony to be taken under oath. Do you have any objection?

MR. SILEY: No.

HEARING OFFICER MARACHI: Would you raise your right hand? Do you solemnly swear that the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you god?

MR. SILEY: I do.

DAVID SILEY

having been duly sworn, testified as follows:

HEARING OFFICER MARACHI: All right. Would you state your full name and position for the record?

THE WITNESS: David Initial R. Siley, S-I-L-E-Y. I'm the Chief of Security at the VA Hospital at 408 First Avenue, in Manhattan.

HEARING OFFICER MARACHI: All right. Mr. Forsetta, would you make your examination.

DIRECT EXAMINATION

BY MR.FORSETTA:

Q Mr. Siley, would you tell us how you became involved in what transpired between Mr. Schwartz and Officer Bailey?

A On the 17th of May, I received a communication from Mr., from the Assistant Hospital, from the Acting Assistant Hospital Direct at the time, Lewis D. "Behail", inviting me to come and see him, because he had received a complaint.

Q Could you explain the nature of that complaint?

A Mr. Kaswan had called the secretary in the Director's Office, informing him that he had a complaint to make against a police officer in the hospital.

Q And could you tell us who that police officer was?

A Mr. Bailey.

Q And what was the nature of the complaint?

A That Mr. Bailey had abused a patient and has assaulted a person who had come to visit the patient.

Q And would you indicate what you did with that information?

A Upon receiving the information and ascertaining who the patient was, on Monday, that was the, I believe that was the 17th, 18th and 19th of May, I attempted to contact Mr. Kaswan who was then a patient on "Row 8 South".

Q Excuse me, the Monday is the date that you did this, cause Monday would be the 17th?

A No. That was the Monday I got the words.

Q Right.

A I attempted to speak to Mr. Kaswan on the following day. He was not available. He was receiving treatment in the other part of the hospital. I attempted to interview Mr. Kaswan on about three occasions with no success.

On the last occasion I was told that he had been discharged from the hospital. That was about the 23rd or the 24th. I'm not too sure.

Q Did you, when you say you attempted to interview Mr.

Kaswan, did you also attempt to interview or speak to Officer Bailey?

A After I received the complaint, which was in the form of a note to Mr. Behail, I spoke to Mr. Bailey on, it was about the end of, it was sometime around, he was off duty and he came to work and I spoke to him about, I think it was the 4 to 12 he was working and I spoke to him and I told him that there was a complaint made regarding an incident that happened on the 14th of May.

I produced the form that he prepared indicating that he had issued two summonses and had had some difficulty with a patient by the name of Mr. Schwartz. We taked about it and Mr. Bailey told me at that time that the men were down in the lobby. It was after hours. The person Schwartz became little bit annoyed at the way Mr. Bailey was talking to the patient and as a result of that he refused to leave and Mr. Bailey said that he then took him to the Security Offices andissued him two summonses. One for failing to leave the hospital property, trespassing I believe it was, and the other was for disorderly conduct.

I asked him, is that all thattranspired? He said, that's all that happened. I then told him, I said, well, if that's all that happened, you have nothing to be conecrned about.

Q Did you speak to any other officers on duty that night about what happened?

A Not that night. I think I spoke to Mr. Parker after I spoke to Mr. Bailey.

Q Had you any idea of when the sequence was - a couple of days after, a week after?

A A Couple of days after.

Q A couple of days after. Now, you had a verbal conversation with Officer Bailey. You also had a verbal conversation with Officer Parker and what did Parker indicate to you when you discussed this with him?

A Parker indicated he had been upstairs on the floors and he was coming downstairs, and when he got down to the lobby, and was leaving the elevator, he heard loud voices in the area of the lobby. As he came from the elevator area to go towards the lobby, he dddsee Mr. Bailey and Mr. Schwartz and Mr. Kaswan in conversation and there was shouting.

There was shouting going on. Bailey indicated that when he approached the scene, that there was a very heated conversation and that he spoke to Mr. Bailey and said, quiet down. You know, take it easy. Let the man go. He then indicated that there were, the man was about to leave the hospital, that is Mr. Schwartz would have left the hospital and he said something that Parker said that he did not hear.

At that point, Mr. Bailey did go towards Mr. Schwartz, taking him by his arm, and he was going to bring towards the Security Office and Mr. Schwartz was resisting and Bailey said that he walked over to Schwartz and took him by the shoulder, he spoke to him, and then he went into the offices.

They told him to go into the office. He was only going to give him a summons, you know, that was the extent of what was going to happen. They went into the offices, the office, and Bailey indicated that, Mr. Bailey asked Mr. Schwartz for some kind of ID. Schwartz refused to give it to him.

Bailey then said it was only for the purpose of identification to give you a summons. At that point, he did give him the ID and Bailey, Parker then left the offices. Now he left the office and he closed the door and he said his back was to the door, but as he was leaving, he indicated that the shade had gone up and Mr. Kaswan, who was sitting in front, said, on my god. He hit my friend. And at that moment, Parker said he turned around and he looked in, and he went back into the offices and separated Mr. Bailey and Mr. Schwartz.

Q Was there anything about Officer Parkers' recounting of the incident that concerned you?

A That concerned me?

Q Yes. What I mean by concerned you, did it put up a red glag and maybe something had transpired that was different from Mr. Bailey's, Officer Bailey's account?

A Well, when I heard his story, and I had earlier spoken to Mr. Bailey and there wasno report of any contact between the two men. That is, the only thing that Mr. Bailey told me that he brought him in and gave him a summons.

Q So your conversation with Mr. Bailey, he never indicated that there was any exhcnage, there was any altercation between him and Mr. Schwartz?

A No.

Q Okay and Mr. Parker verified that he did not witness anything. He was only relating to you what Mr. Kaswan had said - oh my god. He hit my friend.

A When he turned around, Mr. Bailey and Mr. Parker were confronting each other. He had to separate the two men.

Q Okay. Now, will you continue with - okay. You've spoken to Bailey. You're spoken to Parker. And pick up the story from there. What about - you did not have an opportunity to speak to Mr. Kaswan.

A I did not have an opportunity to speak to Mr. Kaswan until the 3rd of June. Then Mr. "Gordon" informed me that Mr. Kaswan and Mr. Schwartz were both coming to his office and he'd like me to be there.

They both came on that date and made a complaint against ---- ---. At that time, Mr. Kaswan had a written statement that he had prepared and he gave that to Mr. Gordon, who was the Assistant and after they, again, orally said that it happened on that date, and were about to leave and they were told that an investigation would be made, Mr. Schwartz was requested to make up a statement, to write a statement and to being it down to my office.

And he did so, I think, on the 17th of June. On the 4th of June, Mr. Bailey was present with me in the offices of Chief of Internal Service, Michael H. Gordon, and he was told what had transpired and that a complaint has deen biled against him and it was a serious one. At this time, at about three-quarters of an hour, discussion with Mr. Bailey, "did" deny having struck or abused anybody in the hospital.

On - I don't know the date that the letter was given to Mr. Bailey - proposing removal, he was brought to the offices of Hospital "Engineering" andhe was given the proposed notice.

Q Okay.

A I believe it was June 24rd. I'm not sure.

HEARING OFFICER MARACHI: The letter of proposed removal was June 10th. It's dated June 10th. It was apparently given to Mr. Bailey on the 11th.

Q Were there any other individuals that you were aware of that could corroborate Officer Bailey's story, relative to his not striking Mr. Schwartz?

A No.

Q In your conversations with Officer Parker, did you at any time attempt to elicit from him an opinion of the behavior of Officer Bailey?

A Well, I spoke to him and this is what he told me. That the whole thing was unnecessary.

Q Mm-hmm.

A "That he should havelet the man go and that would have ended it".

HEARING OFFICER MARACHI: All right. Let me ask you this. Was Mr. Bailey retained on active duty status during the notice period. That is after June 11th, when his proposed notice was handed to him?

THE WITNESS: He was.

HEARING OFFICER SILEY: And this would be ---

THE WITNESS: It was from the 11th to the 23rd.

HEARING OFFICER MARACHI: Of July?

THE WITNESS: Of July.

HEARING OFFICER MARACHI: So he was in active duty.

THE WITNESS: He was working in my office doing clerical duties.

HEARING OFFICER MARACHI: All right. Any further questions, Mr. Forsetta.

MR. FORSETTA: Just a few further questions along the same line.

BY MR. FORSETTA: (Continuing)

Q Did Officer Bailey participate in the customary training that guards were afforded?

A Yes, he was.

Q Okay and is it safe to say that, as part of his training, and this is in the original record, that he was given the, as part of the training manual, The Hospital Police Officer's Personal conduct, how was he supposed to behave under that situation.

A He was.

Q Okay. That's all I have.

EXAMINATION BY THE HEARING OFFICER:

Q All right. In your direct testimony, you indicated that when Officer Parker related the incident, he had stated that just before he stopped in the office, the matter as far s the ID had been settled. In other words, that Mr. Schwartz was refusing to give his Id and that he then intervened and spoke to Mr. Schwartz and that Mr. Schwartz then proceeded to give his Id and then he stepped out.

Now, are you sure that this is what Parker related to you?

A I may not be right, but I'm saying that when they went into the office, there was some loud voices and Parker indicated that Mr. Bailey asked for some ID. Mr. Schwartz refused to give him the ID. Bailey then intervened and said, it's only for ID purposes, so that a summons may be issued to you.

Now, my memory tells me that at this point, Parker left the office.

Q And this is when Mr. Kaswan said, he hit my friend. This was subsequent to the matter ---

A He stayed at the counter in the lobby, behind the desk to get into the Security offices.

Q Okay. All right. Mr. Linker, would you like to cross examine.

CROSS EXAMINATION

BY MR. LINKER:

Q All right. I show you this statement of Mr. Parker and ask if that's substantially what he told you?

A Yes.

Q May I direct your attention specifically to the ID part of it. I ask you if you recall that after Parker returned, after Kaswan had said, oh my god. Somebody hit my friend. Wahther or not Parker told you after he had returned to the office, after that, they were arguing about the ID?

A My memory ---

Q I'm talking about the statement.

A The statement ---

HEARING OFFICER MARACHI: The statement indicates that the question of the ID had risen just prior to - what did Mr. Parker tell you?

THE WITNESS: As best as I canremember, Parker told me that he was leaving the office, the shouting and Mr. Schwartz refused to show Mr. Bailey his ID. He then informed Mr. Parker, in fact, he said, Mr. Parker, said that he - Mr. Schwartz - gave Parker the ID. And then he left the office.

HEARING OFFICER MARACHI: And then he left the office and that at that point, Mr. Kaswan yelled out. Okay.

BY MR. LINKER: (Continuing)

Q Did you notice that when he gave you the report that it was at variance with what he told you with regard to what he did when he got back in?

A You mean when he gave me this?

Q Well, this is Mr. Parker's report of what happened, isn't it?

A That's his statement. That is what happened and he signed it.

Q Now, did he make this statement the day you interviewed him?

A No. I told him to go - I spoke to him and then he left it. It was typed out and he came back and signed it and I took a copy.

Q The same day?

A Not the same day. Shortly thereafter.

Q Did you make any notes when you spoke to him?

A I did not.

Q Did he read the statement over when he gave it to you?

A I read it. I looked at it. I said is that what happened? He said, yes. He signed it and that was it.

Q Didn't he testify on direct examination, right here today thatwhen he went back in, they were confronting each other and he separated them and he took the man's ID and gave it over?

A No, I didn't.

Q That Parker told him that? Not that he did.

HEARING OFFICER MARACHI: No, he did not.

Q When did you say your interviewed Mr. Bailey for the first time in this event?

A It was on his first tour's back. I don't recall the exact date. But he was doing a 4 to 12 and had not been in the office working for a couple of days. On his first tour back, I believe it was on a Wednesday. He was ona 4 to 12 and I informed him what had transpired in his absence.

That a complaint was filed with the director's office and I asked him what happened between him, the patient and the person who came to see him and I had a copy of his report. That is the 1013-92 that is used to file anything that happened of a nature of a public complaint in the hospital.

I had it in my hand and I spoke to him. I said, what happened and he told me almost verbatim what was on that report.

Q Now who told you that Officer Bailey was involved in any report, on May 17th, 1976? Who was it that told you that there was a complaint against an officer named Bailey on May 17th.

A I was ---

Q No, no. Did anyone tell you that there was a complaint involved. Did they name Mr. Bailey as someone whom a complaint had been made against?

A No.

Q The only thing you were told on May 17th was that there was an oral complaint from a patient, Mr. Joseph Kaswan. Is that correct?

A That's correct.

Q Did anyone tell you, anyone tell you, that there was any kind of complaint against Mr. Bailey on May 17th? Yes or no.

A No.

Q Did you speak to anybody about any complaint against Mr. Bailey on May 17th?

A No.

Q Now you say that you interviewed Mr. Bailey on May 18th, on page two of your letter dated June 25.

A This statement wasprobably wrong, because it was a couple of days later. He wasn't in for the first couple of days. It might have been an error when it was typed.

It was a few days after, because he was off for two days. So I couldn't speak to him.

Q Well --

HEARING OFFICER MARACHI: I think the point here is how did you determine after you initially received a complaint that - if Mr. Bailey wasn't identified by name - that it was him who had, you know, been involved?

THE WITNESS: I ascertained ----

Mr.RLINKERFICER MARACHI: Excuse me. I know - I'm trying to make a record here. And I'd appreciate it if I could rebut the defense in my own way. I'm making this for the record. If I may.

HEARING OFFICER MARACHI: Well, then you may ask the questions you prefer.

MR. LINKER: If I may. I know what I have to do here to make the record and I'm making my record to protect my client and I would appreciate it, Mr. Hearing Officer, sir, if you would not give the witness a chance to change my entire line of defense. I'd appreciate that, sir.

HEARING OFFICER MARACHI: I'm not quite sure that I - you know part of the purpose of this hearing is to try and ascertain certain fact and what they were and I - we have an obligation here. You may proceed with your examination.

BY MR. LINKER: (Continuing)

Q In all events, you say that youdid - you're sure now that you interviewed Mr. Bailey sometime during the week, the week of May 14th was Friday, 17th, 18th and 19th, it would have been about there. Did you make any notes whatsoever of that interview sir?

A No, I did not.

Q Did you at that time, after you interviewed Mr. Bailey, that week, as Mr. Bailey to make a written statement and give it you?

A No, I didnot.

Q Now, I believe you also testified, that same week, toward the end of it, you interviewed Parker?

A I spoke to Parker that week.

Q That week back in may, right?

A Back in May.

Q Did you ask Mr. Parker to give you a written statement at that time, sir?

A I don't recall if I did at that time or not.

Q Do you have any written statement from Parker?

A No, I don't. Not at that time.

Q The only one you have is the one dated June 3. Is that correct?

A Yes.

Q And that one was asked for by you on June 3. Is that correct?

A Yes, it was.

Q There is nothing in your report to Mr. Grogan, this is the hospital record, on June 25, 1976 which would indicate that you ever interviewed Police Officer Parker prior to June 3, is there sir?

A No. There is not.

Q The fact is that you didn't interview Parker or Bailey until June 3, then you went into the office and met Kaswan, Schwartz and Grogran?

A No.

Q Do you have any writing whatsoever, notes or otherwise, do you have any interviews with either Bailey or Parker prior to June 3?

A No, I don't.

Q Prior to - that was june 3 - prior to - did you ever prior - excuse me.

HEARING OFFICER MARACHI: Would you please continue Mr. Linker.

Q Thank you sir. Now, on June 4th, 1976, isn't it a fact that June 4, 1976, was the first time you spoke to Mr.

Bailey with reference to this case?

A No.

Q I show you this document, sir and I ask you to identify it.

HEARING OFFICER MARACHI: May I see the document? You would like this entered into the record?

MR. LINKER: Yes sir.

HEARING OFFICER MARACHI: Mr. Forsetta, do you have any objection?

MR. FORSETTA: I have no objection.

HEARING OFFICER MARACHI: There being no objection, this will become hearing exhibit No. 2.

(Document referred to above received and marked into evidence as Hearing Exhibit #2 for identification.)

Q Now will you tell us what this document dated June 4, 1976 is?

A That's a memo given to Mr. Bailey.

Q Was that given to him in your presence?

A I don't recall it being in my presence. I knew about it at the time that it happened. I knew that it was going tohappen.

Q Did you bring Mr. Bailey to the office of Mr. Horton, that day, June 4th, 1976? You said you knew it was going to happen.

A Yes.

Q Had you recommended this prior to that? Is that it?

A This was talked about on June 3rd.

Q On june the 3rd and June 3rd was the meeting in the office of Mr. Grogan between you and Mr. Kaswan and Mr. Schwartz and Mr. Grogan. Is that correct?

A Yes.

Q Now, was Mr. Bailey called to that office at that meeting on June 3?

A No, he was not.

Q Was Mr. Bailey, at any time prior to June 4th - Mr. ----

A Mr. Bailey was given this memorandum, Exhibit #2, June 4th and told that he would have a right to counsle.

Q Was he told at any time prior to that that he had a right to representation before June 4th.

A Before June 4th?

Q Yes sir.

A No.

Q At anytime before June 4th, 1976, was he told about the union grievance procedure?

A Was he told about the union procedure?

Q Yes. To your knowledge.

A No.

Q Posted in the hospital are schedules of offenses and penalties. I think it's Exhibit ---

HEARING OFFICER MARACHI: It's Hearing Exhibit 1.

Q Hearing Exhibit 1, is that correct sir?

A Tht's a statement of offenses and penalties ---

Q You're familiar with it?

A Yes, I am.

Q And it says under this regulation 220 the police, are charged with the enforcement of those regulations.

A Yes, they are.

Q How did it come about that you knew to interview Mr. Bailey back on the week in May that Kaswan had made a complaint against Mr. Bailey? Would you tell us please now - that's what the Hearing Officer wanted to ask you before.

A Upon receiving the notice from Mr. Behail, I went to the office and found out who was working that day.

Q And how many people were working that day?

A I don't recall off hand.

Q Well, how many people are there normally working?

A Anywhere from, in the evening, anywhere frmo two to four.

Q Were you told what time this was supposed to have happened.

MR. FORSETTA: I object to the relevancy of the question. I think it's been established that Officer Bailey was the one who had had the altercation.

MR. LINKER: Not as of the week of May 17th.

MR. FORSETTA: We're here to have a hearing on the incident, not what happened that week.

HEARING OFFICER MARACHI: Would you explain further how you determined ---

THE WITNESS: Mr. Behail indicated that, some time in the evening on the 13th, an officer was on duty in the lobby, did have the altercation with Mr. Schwartz and Schwartz and Kaswan. The rport indicated that a freind of Mr. Kaswan had been assaulted by a police officer.

Q Do you have that note sir?

A I have a copy of it. I have onepage. I can't find that part. I don't know what happened to it. It said Friday the 17th.

Q Now

HEARING OFFICER MARACHI: You indicated that there was a comment on the document ---

THE WITNESS: I can't find all of that. I can't find that page.

HEARING OFFICER MARACHI: This is the same form?

THE WITNESS: Yes it is.

HEARING OFFICER MARACHI: Do you recall what it said.

THE WITNESS: It said that he had been assaulted by the officer on that day, in the evening. That it was during the evening hours.

HEARING OFFICER MARACHI: And the second sheet ---

THE WITNESS: That is the1013-92, the form that is used to record all incidents that occur in the hospital and that's the form that Mr. Bailey had prepared, which I showed him at the time.

HEARING OFFICER MARACHI: This is the complaint?

THE WITNESS: Yes it is.

HEARING OFFICER MARACHI: ---- signed LLewelyn S. Bailey, Supervisor.

THE WITNESS: That's his report to me of the incident that had happened and why he issued two sumonses to Mr. Schwartz on that date.

HEARING OFFICER MARACHI: Okay and this is already part of the record?

THE WITNESS: Yes it is.

HEARING OFFICER MARACHI: This is now part of the record and it will be as requested by counsel unless there is any objection ---

MR. FORSETTA: I have no objection.

HEARING OFFICER MARACHI: This will not become hearing exhibit #3.

Q Did you say that part of this is missing or the back part of this is missing?

A Yes. It was written on the back of it. The complete message was it - the message was on the back of that - but not the entire thing. But I don't know what happened to the back part of that.

Q Well, when you spoke to Mr. Bailey, did you, when you say you spoke to Mr. Bailey on May 18th, a few days after.

A I spoke to Mr. Bailey on his return to work after two days off.

Q Did you tell him anything about him being accused of hitting someone at that time, at that time?

A Yes, I did.

Q You testified here on your direct examination that you told him that he had been accused of hitting someone.

A I told him that a complaint has been - I don't think I told him about hitting anybody - yes - I said there had been a complaint about him assaulting a patient and you know, assaulting a person who came to visit a patient and abusing the patient.

Q That's what you said here on direct?

A I'm quite sure that's what I said.

Q Whose handwriting is that on thisnote?

A That's Miss Lee - she's the secretary to the Director of the Hospital.

Q And you don't have ---

A I don't have the other part. I did copy it but what happened to it, I don't know. It couldhave been misland in another file or something.

Q Do you have any other notes which would bear - anything - which would bear on whether or not you spoke to Mr. Bailey that week in May?

A No, I have no written notes about Mr. Bailey except I have a verbal conversation with him on his return to work. And I ---

Q Is it possible that you didn't speak to him until June 4th?

A No sir. I spoke to him the week that I got the note - when I was notified about the complaint.

Cross - Siley

Q Now when the two people Kaswan and Schwartz were in the ASsistant Director's Office on June 3, 1976, was the subject of the two summonses discussed?

A Yes.

Q And what was done to them?

A They were dismissed.

Q Right there?

A I was instructed by the Assistant Director that we would not prosecute because there was no ground for issuing those summonses.

Q Who determined that?

A Who determined that?

Q Was it you in the cpacity of Chief of Police?

A No. It was done on the order - after I explained what had happened to Mr. Grogam - I explained it.

Q On june 3?

A On June 3. After the letter of Mr. Kaswan was presented and after the oral interview with Mr. Kaswan, and Mr. Schwartz was informed that the hospital would not prosecute the summonses.

Q Was Mr. Bailey interviewed by anyone besides you at any time? Prior to June 4th.

A On june 3rd.

Q Mr. Bailey?

A "Michael H. Schwartz" interviewed him.

Q Prior to June 4th.

A No. No. He was not interviewed.

Q Was Mr. Bailey asked anything about those summonses before they were dismissed?

A No.

HEARING OFFICER MARACHI: All right, you were telling us before how you determined - and I'm not sure of the answer - how Mr. Bailey was the individual involved?

You went back to the log and determined that he was the Supervisor ---

THE WITNESS: I went back to the log and determined who was working. I asked Parker. He said there was an altercation between Mr. Parker and the gentleman. Between Mr. Bailey and a gentleman.

HEARING OFFICER MARACHI: All right.

THE WITNESS: I didn't take it any further. I went and I spole to him at the time he came back to work.

HEARING OFFICER MARACHI: Was there a third officer on duty that nght?

THE WITNESS: There was. A Mr. McIntosh.

HEARING OFFICER MARACHI: Did you ever question Mr. McIntosh?

THE WITNESS: I did.

HEARING OFFICER MARACHI: And what did he say to you?

THE WITNESS: He had no knowledge of what had occurred.

HEARING OFFICER MARACHI: All right. Were there any other officers on duty?

THE WITNESS: Not to my knowledge.

BYMR. LINKER: (Continuing)

Q Now what did you do with reference to this case between the time you were, you interviewed Mr. Bailey, you said on May 18th or 19th or so and Mr. Parker that same week, and June 3 when you went in to see Schwartz and Kaswan?

A What did I do?

Q Yes.

A I did nothing. I did nothing. I tried to interview Mr. Kaswan with no results and I went upstairs and found out - I had left word with Mrs. Hutchinson that I wanted to see him. He did not come to see me and it laid dormant until the 3rd of June when I was told to come upstiars to the Director's Office and that Mr. Kaswan and Mr. Schwartz would be present.

Q Now, your report on this incident, your report on your investigation of this incident, is this report dated June 25, 1976 and I'm showing the witness the official file of that report of June 25, 1976. Is that correct?

A that's correct.

Q Well, is that report?

A I don't - I filed the information ---

Q Sir, is that your official report of this incident?

A Yes, it is.

Q That's the report of your investigation. Is that correct?

A yes.

Q There's no earlier report in this file. When was this report written by you to Mr. Grogan? Was it June 25th or ---

A June 25th. Right. I had it typed on June 25th. Now, when he got it was probably the same. I guarantee here and now ------ -----.

Q You interviewed regarding the charges against Mr. Bailey pursuant to the contract took place on June 21, 1976? Would you know if the interview of the proposed removal charges against Mr. Bailey when he attended with his union official in the office of Mr. Behail that took place on June 21, 1976?

A I gave Mr. Bailey permission to go to see the union representative while he was on clerical duty and I do know that he went up to the union and I do know that he came in the hospital on one day, on one occasion and I do know that he spoke to Mr. Everett.

Q So it was before June 25th, 1976, your report of the charges would not have been there. Is that correct?

A Yes.

Q All right. The last item, this meeting with ---- which took place on May 24th, 1976 where officers Catlow and Carey ----

MR. FORSETTA: I object to the relevancy of that issue. How does it relate to the case?

MR. LINKER: That was raised by Mr. Bailey in his letter to the Veteran's Administration.

MR. FORSETTA: How does it relate to the issue?

MR. LINKER: It's set forth in Mr. Bailey's letter.

HEARIJG OFFICER MARACHI: What does it set forth?

MR. LINKER: In the letter ----

HEARING OFFICER MARACHI: I understand that it is set forth. Will you respond to his objection?

MR. LINKER: It's relevant to the issue because of prejudice and bias against Mr. Bailey. And I'm going to get Mr. Everett to identify the prejudice under testimony.

MR. FORSETTA: May I see that please?

MR. LINKER: What?

MR. FORSETTA: The letter that you're referring to right now. I object to the relevancy of this statement. I don't know what it has to do with prejudices in this case.

HEARING OFFICER MARACHI: Would you clarify?

MR. FORSETTA: Can we have this off the record?

MR. LINKER: The point I'm trying to make is that there was three officer involved and the ---- --- of this witness is that the Engineering Department, which directs Security, and number two is that on May 24th, these two other officers arrested an Engineering Officer, Mr. "KellY" and brought him up to their supervisor Mr. Bailey and that incident on May 24th, that two of these three man, namely Bailey and Carey have now been removed.

MR. FORSETTA: I object to that sir. I think the Carey situation is going before this board. It's a completely different issue.

MR. LINKER: And the third man was brought up on charges - subsequently there were charges pending or he's been dismissed.

MR. FORSETTA: That has no bering to the case at hand.

HEARING OFFICER MARACHI: This was subsequent to the ----

MR. LINKER: May 24th. So it's prior to the administrative document and as of May 24th, there wasn't a single document of any type of investigation on file anywhere. The only reference to anything prior to May 24th -----

HEARING OFFICER MARACHI: I'm trying to follow you. Are you trying to indicate to me that the appellant here is being removed under these charges and these are -- the real reason is the incident on the 24th.

MR. LINKER: The extreme punishment of dismissal would never have occurred for this man but for that and I don't think that the investigation would have gone as far but for that, yes.

MR. FORSETTA: That's an absolute and total fabrication.

MR. LINKER: It's no fabrication, Mr. Forsetta.

MR. FORSETTA: It certainly is. The whole thing is contrived. And if you are familiar with the circumstances of the removal of the one gentlemen, you would be aware that my objection is valid.

HEARING OFFICER MARACHI: I'll permit some limited questioning and I think the record should lend itself . All right you may question the witness on this incident.

Q You direct superior is Mr. Horton, of the Engineering Department. Isn't that correct?

A Yes.

Q And the Engineering Department is the superior to the police department?

A The Security Section is a section is a section ---

Q You report to Engineering. Is that correct?

A I report to the Chief Engineer.

Q Now, I show you this entry and I ask you to - it's the incident involving officer "Catlow and Carey". It's on May 24th. Could we have this entered?

HEARING OFFICER MARACHI: Well, it is part of the record. It is attached to Mr. Bailey's letter and it is now part of the record.

Q Mr. Bailey made these entires into the log. Is that correct?

A The end of each entry, there are the initials ---

which I know to be that of Llewelyn Bailey.

Q And who is Mr. Kelly?

A He is assistant Engineering Officer, Assistant Chief.

Q And Officers Catlow and Carey put Mr. Kelly in handcuffs stating that he was seen in the basement floor. Is that correct?

A Yes sir.

Q Isn't it a fact that Officer Carey has not been sismissed. Is that correct?

A Yes.

Q And isn't it a fact that Catlow and Carey too Mr. Kelly up to Mr. Bailey in that situation.

A That's right.

Q And Mr. Bailey has now been fired?

A He's been terminated.

Q And isn't it a fact that Mr. Catlow as well was at one time put on charges?

A Charges were preferred against Catlow?

Q Yes.

A No charges were ever ----

Q They were - if you know.

A No charges were ever -----

MR. FORSETTA: He indicated no.

MR. LINKER: Okay. No further questions.

HEARING OFFICER MARACHI: All right. Would you indicate to us the circumstance involving Mr. Carey.

THE WITNESS: Mr. Carey was up on one floor of the hospital and he did assault a patient in the elevator area and a conviction was made in which there were five witnesses. A doctor, a secretary in the Chief of Staff's office ---

HEARING OFFICER MARACHI: This was on May 24th, that he ---

THE WITNESS: I don't know theexact date. It occured after the incident with Mr. Schwartz.

HEARING OFFICER MARACHI: Okay. The summary that you referred to, is this a description of the incident that led to Mr. Carey's, you know ---

THE WITNESS: No, it is not.

HEARING OFFICER MARACHI: This has nothing to do with it?

THE WITNESS: No.

HEARING OFFICER MARACHI: With the reasons why ---

THE WITNESS: No.

HEARING OFFICER MARACHI: Okay. Was it proposed to remove Mr. Carey. Is that what action has been taken against him?

THE WITNESS: Mr. Carey has been removed.

HEARING OFFICER MARACHI: All right and you're indicating that it had nothing to do with ----

THE WITNESS: With anything tht happened with the Assistant Chief. An incident happened after that with a patient in the hospital. It has nothing to do with this at all.

HEARING OFFICER MARACHI: To your knowledge, does this incident have anything to do with the action going against Mr. Bailey?

THE WITNESS: This was an independent action - no.

HEARING OFFICER MARACHI: Okay. Mr. Forsetta, have you concluded your cross examination?

MR. LINKER: I have one further ---

HEARING OFFICER MARACHI: All right.

Q Were you present yesterday when I went to the hospital with Mr. Bailey and another gentleman?

A Yes, I was.

Q And I think you were in the office?

A Yes, I was.

Q And do you recall if the shade was down at the office?

A The shade is always kept up.

Q Always kept up?

A That's correct.

Q To you knowledge, the shade is always kept up.

A Yes.

Q All right. I'm sorry. Exactly what time were we there - it was in the daytime. Is it normal hospital procedure sir for the Chief of Police to - in this case - normal hospital procedure after the hospital closed, to secure off the main exit from the hospital.

A When you say secure ----

Q Close the exit doors leading out of the hospital, so that they would have to be opened if anybody wanted to leave?

A The exit doors are not locked because that's a fire hazard. It's against fire regulations to lock your door. But the lobby itself is trestricted - people are - in most instances they have a rope across the corridor nad it says lobby area closed. At most time. Not all times but most times it is put there.

Q That rope barrier is from the elevator into the lobby?

A No. It's in the corridor, as you leave the elevator corridor, you make a left turn, you go toward the mail lobby, it's there.

Q It's placed after closing hours.

A Well sometimes - I do come in at night sometimes - andit's not there and I've asked why isn't it there but that happens.

Q Right. It should be there?

A Yes, it should be there.

Q And does that also direct people to a different exit down the hall going the other way?

A I never saw that.

HEARING OFFICER MARACHI: Mr. Forsetta, do you have anything further?

REDIRECT EXAMINATION

BY MR. FORSETTA:

Q Dave, you indicated that it is customary policy for that shade alwasy to be down?

A It isn't always down. It's up on some occasions. I haev had it up fi there were a lot of activities and I'm short of manpower, it is up so we have a clear view of the lobby. But on most occasions, it's down.

Q What kind of a shade.

A It's just a shade and it has a string.

Q There's noway to tie it on the bottom to prevent it from going up?

Q A normal shade type thing.

A It's a shade over the glass.

Q If you have no objection, could I just cover a piece of information about the removall of Officer Carey.

HEARING OFFICER MARACHI: Sure.

Q In your familiarity with the rules and regulations, is it not a fact that one of the most heinous acts that a government employee can do is to abuse a patient?

A Yes, it is.

Q Is it also not a fact that the only course of action an institution has when it finds patient abuse, maybepatient abuse which does include striking the patient is removal?

A That's correct.

HEARING OFFICER MARACHI: In this incident that involved Mr. Carey, I want to make sure this is clear on the record, in your dissertation you indicated that this occurred after May 24th?

THE WITNESS: It occurred after May 24th.

HEARING OFFICER MARACHI: Do you recall approixmately when?

THE WITNESS: I would say it occured within a week after the 24th. The exact date I do not know.

MR. FORSETTA: We can get that information.

HEARING OFFICER MARACHI: All right. But it was subsequent to May 24th?

THE WITNESS: It was.

HEARING OFFICER MARACHI: All right. Mr. Linker, do you have anything further?

MR. LINKER: No sir.

HEARING OFFICER MARACHI: All right. There being no further questions, you're excused and thank you for having come down to testify. I'd like to ask you not to discuss your testimoy until the close of the hearing at least. Thank you.

(Whereupon the witness was excused and left the room.)

HEARING OFFICER MARACHI: All right. Does this close the agency's case on the record?

MR. FORSETTA: It does.

HEARING OFFICER MARACHI: All right, Mr. Linker, would you like to proceed with your case.

MR. LINKER: If I may ----

(Whereupon a break was taken.)

MR. LINKER: This is Samuel B. Mitzner.

HEARING OFFICER MARACHI: All right. Mr. Mitzner. Let's me identify myself ----

MR. MITZNER: Would you speak a little louder?

HEARING OFFICER MARACHI: All right. I'll try to speak as loud as possible so you can hear me. I'll identify myself. My name is Dennis Marachi. I'm the Civil Service Hearing Officer. The gentleman to my right is Mr. Forsetta. He's the agency representative in this action. I think you know Mr. Bailey and his representative.

You've been asked to come down and testify, I believe, on Mr. Bailey's behalf. It's customary at these hearings for all testimony to be taken under oath. Do you have any objection?

MR. MITZNER: No.

HEARING OFFICER MARACHI: Fine. Would you riase your right hand? Do you solemnly swear that the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you god.

MR. MITZNER: I do.

SAMUEL MITZNER

having been duly sworn, testified as follows:

HEARING OFFICER MARACHI: All right. Would you state your full name and positition title.

THE WITNESS: My full name is Samuel B. Mitzner, M-I-T-Z-N-E-R.

HEARING OFFICER MARACHI: And are you working sir?

THE WITNESS: I am a housing consultant.

HEARING OFFICER MARACHI: And who is this for? Who are you housing consultant for?

THE WITNESS: What did you say?

HEARING OFFICER MARACHI: Who are you a housing consultant for?

THE WITNESS: Free lance.

HEARING OFFICER MARACHI: You're free lance. Okay. Mr. Linker, would you like to examine the witness?

MR. LINKER: Yes.

DIRECT EXAMINATION

BY MR. LINKER:

Q Prior to the time you were a housing consultant, were you in another capacity in the real estate field?

A I was attached for 45 and a half years with various city departments, primarily starting with the "Tenement House Department", superceded then by the Department of Housing and Buildings, superceded then by the Building Department, which was then taken under an umbrella agency known as the Housing Development Administration for 45½ years.

Q And you retired voluntarily and are receiving a pension?

A I retired voluntarily in October of 1966.

Q And you also, in your carrer, have done other work with housing?

A Correct.

Q And ---

A I have occasion to look at various proposed parts of buildings in what we call old law tenements, new law tenements, Class A multiple dwellings, toilets in the yard, water sheds in the yard, all old houses as well as new construction.

Q Have you studied housing and its component parts all your life sir?

A I did.

Q And was there occasion also, when you, among other component parts, you had occasion to actually work on shades in houses?

A Oh yes. I did work in shades in my own house. Als in property that was owned by my grandfather years back [illegible] and also my present wife, who owns property, I have present day shades. Reroll them, staple them on, reapir them and anything else.

Q Now sir, at my request did you come with me yesterday to Veteran's Administration Hospital, I tihnk on 23rd Street, in, First Avenue and East 24th Stteet in lower Manhattan?

A I did.

Q Was it about four o'clock yesterday afternoon sir?

A Approximatly, yes.

Q With Mr. Bailey and myelf. Si that correct?

A Correct.

Q And did you come into the main lobby with us?

A I came into the main lobby.

Q All right now, tell the Hearing officer what you saw?

A I passed Mr. Bailey where was the room in question where the shade, where the question is about the shade and he pointed to the room.

Q Now when you got there was that shade down or up?

A The shade was down, and there was translucent glass visible from the outside in the lobby. But the inside was not visible because the shade ocvered the translucent glass, which was set in a panel into the door.

Q Did you take certain measurements sir?

A I did.

Q Would you please read those measurements?

A The shade in question, which wasphysically visible to me from the inside of the so-called Security Room was a "normal-type shade" beige cloth window shade. The "use" was worn and edges of it were frayed. It was suspended with a roller type by two-inch metal brackets as you faced the door on the inside of the room, the pinpoint of the roller-type was of a left hand side and the other part were the - with a rectangular metal sticking out which enclosed the so-called mechanism of the shade is on the left hand side.

Q The ---- was on the left hand side. You indicated, you said left.

A No, it was on the right hand side. I then looked at the shade and I attempted to put my finger, I put my finger on the shade and hit it several times and from my exportise with loops, I tried to pull the shade down to see whether the ahde moved by itself.

Q Excuse me. The ahde was already down.

A The shade was down, right to the edge of the window not all the way down. I tried to get the shade lower so that it would raise itself by pulling the - which is customary - by pulling the shade by the cord a little bit down, to see if it would go up.

It did not go up. I then pulled the shade all the way down to the floor and the shade still didn't go up. I then put the shade off the brackets and I rerolled the shade. I turned the thing around as I rolled the shade. I put it back on again.

That would set the shade in a more active position. I then - I measured the glass when the shade was off. I measured the glass.

Q How wide was the glass?

A The glass, the insulated glass was 37 3/4 inches wide and the length was 31 and 5/16 inches in length.

Q N ow was thig glass ----

A And this glass was a translucent glass and it was not tight fitted.

Q Was this glass any kind of shatterproof glas or any kind of strong glass?

A No. No. It was ordinary translucent glass which is used in a case like this, for light only.

Q How thick was that glass?

A I would see, I could't measure the glass because it was set in a frame like and the glass itself was shaking, and if I took the actual measurement of the glass, I could have taken it, if it was tight fitting glass, but being there was a glue all around it, - in my estimation, I would say theglass was anywhere from about 1/16 to 1/8 inch in thicknes.

Q It was pretty thin glass.

A Very thin glass and I actually knocked at the glass with my hand like this, with my fist like this.

Q Nos, Mr. Mitzner, did you attempt to do anything to the glass with the shade on it, with the shade on it, after you had tightened the shade?

A I did.

Q With your elbow?

A Right.

Q Tell us what you did and what happened?

A I raised my elbow right below shoulder level and I used a little bit of what they call force to see whether the pressure of my elbow would hold and if I used too much pressure it probably would have shattered.

In other words, if I was to take this elbow of mine and go back with a force the glass would shatter and break. Now, there's all kind of glass ---

Q Excuse me. You did hit it with your elbow, but as hardas you thought you could without shattering the glass?

A Right.

Q What happened to the shade?

A The shade did not go up. The shade stayed there.

Q Now, in y9ur experiments in this field, in your opinion, could that shade in that location, have been brought to an up position by somebody standing in front of the shade and hitting with force not sufficient to break the window?

A In this condition of that shade, I would say no.

Q Any possibility that shade could go up without the window breaking?

A By touching it? No.

Q Is there anything else, Mr. Mitzner?

A The only other thing is this here thing. The translucent glass was not shatterproof. It could shatter and break. But while the glass can be broken by shattering it first. Now I happen to be an instructor also in the ---- ----, which is a ---- derivative of steel ---- ----. And if you wanted to put a certain stud into a steel plate, there are three types of power to use.

What they call low velocity, middle velocity and high velocity. In order to show you, I have my license with me here ----

MR. FORSETTA: Is this relevant to the glass?

THE WITNESS: It's relevant to glass in that sometimes we haveoccasion to put studs through an all-glass ---

MR. FORSETTA: But there are no studs in this door.

THE WITNESS: No.

MR. LINKER: Thank you very much sir.

HEARING OFFICER MARACHI: Mr. Forsetta, would you like to cross examine?

MR. FORSETTA: Yes.

CROSS EXAMINATION

BY MR. FORSETTA:

Q You - I'd just like to ask you a few question. Did you verify that was indeed the shade ---

A What did you say?

Q Did you verify that that was indeed the shade that was up on the evening in question?

A Did I verify what?

Q Is that the same shade that was there the night in question?

A It was made out to be the shade that was there?

Q Was it established ---

A I don't know whether it was the shade.

Q Okay. Second, ----

A I did ask the defendant, Mr. Bailey. in the presence of another gentleman, if that was the same shade that was there at the time of the alleged altercation which I didn't know a thing about at that time and He told me in the presence of the other gentleman, the gentleman who was here a little while ago, that was the same shade. I then asked Mr. Bailey if that shade was ever re-altered or was the glass reset? And he said to the best of his knowledge, no.

Q To the best of his knowledge, no.

A Right.

Q Okay. Since you're an expert in shades, would you explain to me how shade mechanisms go up?

A How what?

Q How they roll up?

A How they roll up?

Q Yes.

A If you've got a --- ---- shade, for instance, and you have a seven foot drop and you pull a five foot shade down to the floor, you will tear it off the staples.

Q No, I'm not talking about that. I'm talking about the internal mechanism of the shade. How do you wear out the internal mechanism of a shade?

A Sometimes they can be worn out by pulling a shade a long way. They can be worn out by having a shorter shade to the length of the floor. Now, this shade, by the way, ---- ---- ---. I measured the shade all the way down to the fllor.

HEARING OFFICER MARACHI: It's longer than the window.

THE WITNESS: And it's a seven foot shade.

Q Is it conceivable that a mechanism can wear out from constant use?

A No.

Q It's not conceivable?

A Ordinary use, no.

Q Would you term that as ordinary use?

A What?

Q Would you term that as ordinary use?

A Well, I would say if you pull a shade down in the center of a shade, that would be ordinary use. But if, you know, a shade on the right and the left end, you're going to pull it off the angle and that will - that will make - that will spoil the mechanism.

Q Have you ever been involved in a situation where a shade through some reason just flied up?

A No.

Q Nver?

A No.

Q It never happened in your house?

A No.

Q It never happened anywhere where the shade just flew up. You were sitting in the living room and the shade just flies up?

A No.

Q It never happend.

HEARING OFFICER MARACHI: And you say this is in the agreement?

MR. EVERETT: That's correct. If the employee does not know his rights, it is management's procedure to advise him of his rights.

MR. FORSETTA: Anything in the contract that says he's entitled to a union representative? Or a representative.

MR. EVERETT: A union representative.

HEARING OFFICER MARACHI: Well, does it say in the contract that management is supposed to advise him that he has this right? Or does it say that if he requests a union representative, you know, then they should provide him with one..

There's a very big difference.

MR. EVERETT: Yes. I agree. It says that he can request to have a union representative.

HEARING OFFICER MARACHI: And if he so requests, the n management is to provide him with a representative, before proceeding. Is that correct?

MR. EVERETT: Correct.

HEARING OFFICER MARACHI: All right, it follows that the distinction is an important decision. Am correct?

MR. EVERETT: Yes.

HEARING OFFICER MARACHI: If Mr. Bailey here had not requested a union representative would it have been improper to hand him the proposed action?

THE WITNESS: It would have been improper because it's just like when a police officer aresssts someone on the street, he has to read his rights to the person.

HEARING OFFICER MARACHI: It doesn't say that in the union agreement, that they have to advise him of his rights to a representative? Or does it say at the request for representative, he can have one?

MR. EVERETT: If he requests to haveone.

HEARING OFFICER MARACHI: There is a difference. It doesn't say in the union contract, according to what you're telling us, that they have to notify him that he's entitled to a union representative, does it?

THE WITNESS: Any adverse action that ----

HEARING OFFICER MARACHI: No. Just answer yes or no to my question. Does it state in this agreement that you made reference to that if an adverse action is brought against an employee, that management or the individual who is handing him this notice of proposed action is supposed to notify him that he can have representation right then and there. Does it say that?

MR. EVERETT: Yes, it says that. Any adverse action takes place against an employee, shall have a union representative with him.

MR. FORSETTA: I think it says he's entitled to union representation.

THE WITNESS: Entitled to union representation. You see, I think you're switching your testimony and you may be mistaken before and now you're going back the other way and if necessary, then I'm going to request this document. Youknow, I've had a numberof cases before with the VA Hospital and frankly, you know, I think you're confusing something a little bit.

If not, if what you're telling me is the truth, then I'm going to have to see this agreement. I don't know how relevant it is, but if it is important. Was Mr. Bailey entitled as a matter of fact, according to your agreement, to have management notify him that he has a right to have somebody there?

Is that correct?

THE WITNESS: Yes.

HEARING OFFICER MARACHI: They were supposed to notify him that he's entitled to have someone there?

THE WITNESS: Yes.

HEARING OFFICER MARACHI: Whether he requested someone or not?

THE WITNESS: Yes.

HEARING OFFICER MARACHI: All right. Would you provide that information for me?

MR EVERETT: I'll get it for you tomorrow.

HEARING OFFICER MARACHI: All right. You could mail it into our office, if that's agreeable. Do you have the whole union agreement?

THE WITNESS: Yes.

HEARING OFFICER MARACHI: And how big is that? The package.

THE WITNESS: Not that large. It's about 8 or 9 pages.

HEARING OFFICER MARACHI: 8 or 9 pages? All right. There should be no problem providing that. Mr. Forsetta, you I assume have access to such?

MR. FORSETTA: Yes, I do.

HEARING OFFICER MARACHI: All right. You will mail Mr. Linker a copy.

THE WITNESS: Yes.

HEARING OFFICER MARACHI: Okay. Then I would appreciate it, you know, if you would mail me a copy tomorrow or as soon as possible. I'll leave the record open for ten days. At the end of the ten days, the record will be closed.

THE WITNESS: I understand.

HEARING OFFICER MARACHI: I think ten days is a reasonable period.

THE WITNESS: Correct.

HEARING OFFICER MARACHI: Okay. I'll give the address where it is to be sent. Okay. See Mr. Linker.

Q The second and last point is, are you familiar with the situation involving Mr. Bailey which took place on May 24th, wherein Mr. Petlow and Mr. Carey took a Mr. Kelly, an engineer named Kelly into custoday?

A Yes.

Q Just tell us, tell the Hearing Officer that case.

MR. FORSETTA: I object. I think it's already documented in the record. It's part of the record.

HEARING OFFICER MARACHI: Go ahead.

A Well, it was brought to our attention ---

HEARING OFFICER MARACHI: Try and do it briefly if you can.

A Right. On may 24th, Mr. Kelly, Assistant Chief of Engineering, was arrested by Mr. Petlow and Mr. Carey. At that time, Mr. Bailey was their supervisor. Mr. Siley - they contacted Mr. Siley by telephone and he said not to arrest him and to ---

Q Who contacted Mr. Siley?

A Mr. Bailey. And he said not to arrest him because don't you know who he is and so forth. "They said they saw him just doing his job." Well after that incident ----

HEARING OFFICER BAILEY: They said he was just disorderly and couldn't do his job. Mr. Bailey indicated this to Mr. Siley over the telephone.

THE WITNESS: Correct.

HEARING OFFICER MARACHI: All right. Continue.

A And two days later, as Mr. Kelly and Mr. - the Assistant Director was going through the lobby, Mr. Kelly pointed out Mr. Petlow and Mr. Carey, to the Assistant Director.

Q Mr. Grogan?

A Mr. Gragan. Right. Within that time, Mr. Petlow was brought up on charges of violation of sick leave or something or other and then Mr. Siley took off on vacation, and then they went through a decision which finally ended up with the Chief of Engineering.

He recognized some error or the other. He then ---

HEARING OFFICER MARACHI: What were the charges. For removal, suspension or what?

THE WITNESS: Suspension.

HEARING OFFICER MARACHI: How many days?

THE WITNESS: Ten days, if I'm not mistaken.

HEARING OFFICER MARACHI: Okay.

Q That was Petlow?

A That was Petlow. Correct. But then, when I proved my point to Mr. Horton, Mr. Horton recognized that there was an error.

Q In the procedures? What was wrong?

A In the procedures. Because he was called in and advised and so forth and told what was going on and nothing was done. You know, Siley took off on vacation. And then, when Siley returned and recognized the error andhe says, well, I agree that there was an error, so forget everything.

So Mr. Petlow was reinstated. After that, Mr. Carey had been brought up on charges in another incident which I won't go into, at this time.

HEARING OFFICER MARACHI: So far to your knowledge, the reasons why Mr. Carey was brought up on charges or why Mr. Petlow was brought up was they sought to suspend - did they have anything to do with this May 24th incident?

THE WITNESS: Yes.

HEARING OFFICER MARACHI: In what way?

THE WITNESS: Well, it was just a case of trying to do their job and Siley shows a lot of favoritism and ---

MR. FORSETTA: That's conjecture. I object to that.

HEARING OFFICER MARACHI: I said to your knowledge, in what was are they connected. Do you know that they were connected or are you, you know, I'm not saying taking a guess.

THE WITNESS: Well, it seems quite coincident that these three men that were involved in this incident on May 24th all of sudden now, things are falling in such a way that they tried to get rid of them.

HEARING OFFICER MARACHI: Well, would you say that issuing a suspension letter is trying to get rid of someone?

THE WITNESS: Well, after suspension, proposed removal.

HEARING OFFICER MARACHI: The suspension is what?

THE WITNESS: After suspension, they propose removal. After suspension, they go through records and they dig up what they want to dig up on him and then they propose removal.

HEARING OFFICER MARACHI: To the best of your knowledge, Mr. Potlow was never brought up on charges of proposed removal.

THE WITNESS: No, but we were able to stop it before his proposed removal came up.

HEARING OFFICER MARACHI: Okay. Do you have any further questions, Mr. Linker?

MR. LINKER: Just one.

Q The Engineering Dept., where Mr. Kelly is employed as Assistant Chief Engineer is, for some reason, actually in charge of the police, isn't it?

MR. FORSETTA: I object. Mr. Everett is not qualified to make that determination.

MR. LINKER: The record shows, may I refer to the record to show that the Chief of Police reports to the Engineering Department to Mr. Horton.

MR. FORSETTA: The record shows that he reports to the Chief of Engineering.

MR. LINKER: And that it comes within, under the Engineering Department.

MR. FORSETTA: It does come - if you look at the organization chart of the LEngineering Service, you'll see that there are various Assistant Chiefs with different areas of responsibility. If you try to relate the association between Mr. Kelly and Security it's going to be difficult to establish if you want to follow the organization chart.

I will concede that Security is under the Chief of Engineering. That point I will concede.

HEARING OFFICER MARAchi: All right. Are there any further questions of this witness.

MR. LINKER: Theer is nothing else. That covers everything.

THE WITNESS: This is a closing statement. It's unfortunate that employees, esepcially in the Police Department, are trying to do their job and they're trying to do their job when something comes up, especially the Chief of Service is involved in it, there is some sort of reprisal in it. It's happening right now to Mr. Bailey, Mr. Petlow and

A I have done a lot of maintenance work in old buildings "gratis" my grandfather and I've done shades. I've retaped shade. I have taken a shade where the cloth was frayed, went out and gotnew cloth, stapled it on the wall ——

Q I'm talking about the mechanism. Sometimes you wind it - cause I'm familiar with shades too - sometimes you wind the shade and you don't catch the lock quite properly and sometimes it snaps and it unwinds. But sometimes, the vibrations can cause a shade just toflip up.

A If you want to adjust what you call by winding up the thing there, thenif you put a lip over there, you'll never pull that shade down if it's wound too tight.

Q I'll agree with that, but is it not conceivable that just through spontaneity that that things could just flip up?

A No.

Q It's not possible?

A No.

Q You've never seen it.

A Unless it was too tightly drawn?

Q Well, isn't that conceivable? That might have happened?

A Well, I'll tell you, in this case here, I would say, that shade if it was always there, and the shade was like not tight, and it was a loose shade, cause when I pulled it down, you - to try to raise it, when I pulled it all the way down and she still wouldn't go up, I had to take the shade off the, and that's when I measuredthe window and the doors and everything else.

I would it up again. Then I put it on again. Then I pulled it down right below there and I gave it a little touch - then the shade started going up.

HEARING OFFICER MARACHI: Could you tell us for certain that that day ----

THE WITNESS: What did you say?

HEARING OFFICER MARACHI: You testified that when you went there yesterday the shade was not working, right?

THE WITNESS: I didn't say it was not working. I said that the shade was a loose shade.

MR. FORSETTA: Well, you testified that you pulled it down and that it wouldn't go up.

THE WITNESS: That is correct.

HEARING OFFICER MARACHI: It didn't go up at any point when you pulled it down?

THE WITNESS: That's correct.

MR. FORSETTA: It did go up?

THE WITNESS: After I removed it.

HERING OFFICER MARACHI: And you pulled it and it did go up?

THE WITNESS: Right.

HEARING OFFICER MARACHI: Okay. How do you know whether or not the day of the incident the shade wasn't tightly wound?

THE WITNESS: I can say as far as the day of the incident. Cause I wasn't there the day of the incident.

HEARING OFFICER MARACHI: Okay. All right.

Do you have any further questions, Mr. Linker?

REDIRECT EXAMINATION

BY MR. LINKER:

Q In other words, after you rewound it, you tested it with your elbow. Is that correct?

A That's correct.

Q And did it go up in any form, manner or shape with your elbow?

A It did not.

Q And what about the glass as you hit with your elbow?

A It appeared that the glass was loose.

Q If you has struck it any harder with your elbow, what would have happened?

The glass would have shattered and broke.

Q Mr. Siley, the gentleman who was here, was present at the time?

A He was there very briefly. He waslked in from the other room.

Q And did you ask him if that was the same shade?

A I asked Mr. Bailey that question.

HEARING OFFICER MARACHI: Do you have any further questions for this witness, Mr. Forsetta?

MR. FORSETTA: No sir.

HEARING OFFICER MARACHI: All right, there being no furtherquestions, of you, Mr. Mitzner, I thank you for having come down to testify. Please don't discuss your testimony until after the conclusion of this hearing.

THE WITNESS: I certainly will not.

HEARING OFFICER MARACHI: Fine. Thank you.

(Whereupon the witness was excused and left the room.)

HEARING OFFICER MARACHI: Mr. Linker, do you intend to put the appellant on the stand? At this time.

MR. LINKER: No, not just yet. I have the union man here very briefly.

HEARING OFFICER MARACHI: All right. Mr. Everett, I think you know the appellant and his representative. Do you know Mr. Forsetta?

MR. EVERETT: Yes, I do.

HEARING OFFICER MARACHI: All right. Let me identify myself. My name is Denis Marachi. I'm the Civil Service Commission Hearing Officer. It's customary at these hearings for all testimony to be taken under oath. Do you have any objection?

MR. EVERETT: No, I don't.

HEARING OFFICER MARACHI: Fine. Would you raise your right hand? Do you solemnly swear that the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you god?

MR. EVERETT: I do.

MICHAEL EVERETT

having been duly sworn, testified as follows:

HEARING OFFICER MARACHI: Would you state your full name and position title for the record?

THE WITNESS: I'm Michael L. Everett, President of AFG Local 29 in Manhattan, VA Hospital.

HEARING OFFICER MARACHI: All right. Mr.

Linker, you may begin your examination.

DIRECT EXAMINATION

BY MR. LINKER:

Q Mr. Everett, when for the first time were you familiar with any charges against Mr. Bailey?

A On May ~~the~~ 15th or May the 16th.

Q That's the date of the charges. When for the first time were you told anything or did you go anywhere with Mr. Bailey.

A Oh. Mr. Bailey came to me on June the 10th with a letter of proposed removal.

Q That's the first time you knew anything about this particular case?

A Correct.

Q Do you have that letter of proposed removal?

A Yes, I do.

Q Right. Now, what did you do then sir?

A Well, I followed grievance procedure and the following step was to the Director.

Q And when did you meet with the directors?

A I mett with the director on June the 21st.

Q Now, would you tell us what the normal procedure is pursuant to the union contract, when a grievance procedure is being filed and you meet with the Director on behalf of any of your members?

A Well, the procedure that's followed: usually the steward and the president of the local speak to the immediate supervisor of the employee. After meeting with the main supervisor, if we're not satisfied with that step, we go to Chief of Service.

And not being satisfeid at that step, then we appeal to see the Director. Like in Mr. Bailey's case, he received several letters and within that time, we were workingzing on it and we recognized the following step would be to meet with the Director, which we appealed to the Director.

And the following person met with the Director on June 21st was Mr. Washington, myself, Mr. Bailey. At that time he was the Director, and the Assistant Director Mr. Grogan. At this meeting, we challenged the Director on the procedure on which Mr. Bailey's case was handled and ---

Q In what respect? Why did you challenge it?

A Well, the reason I would challenge it is because Mr. Bailey verfied to us and management verified to us also that actually Mr. Bailey was not actually with a union representative.

Now, all union members, whenever they have a problem, and they're going to get interviewed by management, the final interview, they're supposed to have a union representative with them and at that time Mr. Bailey did not have a union representative with him. And it was re-examined, as far as sitting at the table with the Director, there was only one statement in there from Mr. Siley. Here it is.

Q Well, ----

A That was the only statement that was in the file at that time.

Q It was the whole file.

A Correct. And the only thing we had was a statement from Mr. Bailey. And that's when I challenged the director also, saying there was no union representative at the time when you saw he'd been interviewed.

HEARING OFFICER MARACHI: May I see the document?

MR. LINKER: Yes. This was the only document given in regard to Mr. Siley. I don't think that's in the record, sir.

HEARING OFFICER MARACHI: You've indicated that it's customary when charges are brought up against an employee, such as Mr. Bailey in this case, that they should be afforded union representation?

MR. EVERETT: Yes.

HEARING OFFICER MARACHI: Besides being customary, is this governed by any union agreement or regulation? Do you have anything specifically on point?

MR. EVERETT: Yes. I don't have a copy with me, but it's in our contract.

HEARING OFFICER MARACHI: Well, that's the whole point, you know. You're making this statement now - where is it in the contract? What does it state?

MR. EVERETT: Is there a possibility of mailing it in?

HEARING OFFICER MARACHI: It's possible but then it can't be cross examined, can it? All right, do you want to enter this document into the record, Mr. Linker?

MR. LINKER: Yes.

HEARING OFFICER MARACHI: All right, Mr. Forsetta, do you have any objection?

MR. FORSETTA: No.

HEARING OFFICER MARACHI: All right, this will become Hearing Exhibit #4. Do you have any further questions of this witness?

MR. LINKER: Yes.

BY MR. LINKER: (Continuing)

Q This document was the only report of investigation of charges given to you when you went to see Mr. Grogan on - what date was that?

A June 21st.

Q On June 21st. It's dated June 21st. Right. I'm sorry.

A Because I went down to Personnel and I wanted to get everything together before I went to see the Director.

Q No, I'm certain that there is nothing in this report dated June 21st of an investigation signed by Mr. Siley with reference to any previous interview with Mr. Bailey. And you noticed that when you read that report of investigation dated June 21st, 1976. Is that correct?

A That's correct.

Q There was no report that Chief Siley had ever even interviewed Mr. Bailey prior to that date?

A Correct.

Q There was no report of any interview at all with Mr. Bailey prior to that date? Isn't that correct?

A Not that I know of.

Q And here it was June 21st which was a month and a week after the alleged incident.

A That's correct.

Q And had you ever, in all the years you were in the union, sir, in a high position, hzve you ever heard of a VA official or any other government official being treated in such an arbitrary manner, where over a month and seven days, an investigation had not even been interviewed?

A Weell, there had been an incident with Mr. Siley in his service.

Q Now, I want to retract that - I'm sorry. I want to retract that. June 6th was the statement of Mr. Bailey. I beg your pardon. June 6th is - June 4th is a statement Mr. Bailey - I beg your pardon. I must retract. June 4th is a statement of Mr. Bailey and I want to retract - there's a statement on the witness stand I showed you before, Mr. Everett. It was June 4th.

Now, again have you ever heard of a case where no interview with the defendant was given to you ----

HEARING OFFICER MARACHI: Well, let's make it the appellant. This is not a criminal action. All right.

Q With the appellant that no report of any interview was given to you when you went up on the grievance hearing?

A Well there had been evident hearsay. But Mr. Petlow had also been a police officer and I approached Mr. Siley and Mr. Horton, they recognized their error and they withdrew

The employee is not still with us.

Q That's Mr. Petlow?

A Right. Because also there was an incident occurred on June 24th, Mr. Petlow and Mr. Carey arrested the Assistant --

MR. FORSETTA: I object to that. This is has already been covered.

Q I was just going to ask him about that. But I want to get back to Bailey, sir. On the meeting on June 21 ---

HEARING OFFICER MARACHI: Let's try and get one thing clear on the meeting on June 21. This meeting on June 21 was in the Director's Office. Was that were it was held?

MR. EVERETT: Yes. And the director was present. The Assistant Director, Mr. Bailey, Mr. Washington and myself.

HEARING OFFICER MARACHI: All right. Was this held pursuant to the grievance procedure or was this held pursuant to the notice of proposed removal action that was being issued to Mr. Bailey?

MR. EVERETT: After the grievance procedure. It's the last stop before coming to the Civil Service Commissioner.

HEARING OFFICER MARACHI: Thishad nothing to do with the proposed notice of adverse action.

MR. EVERETT: Well, yes, it's all one. In our contract - it says after ---- of decision, the lass top before going to the Civil Service Commission is to discuss it with the Director. And that's what we did.

HEARING OFFICER MARACHI: Okay.

Q Just to get it safe in my mind. You complained to be direct about the fact that he had violated the contract in that Mr. Bailey had never been afforded an opportunity to have a lawyer or a union representative present when he was being interviewed.

A That's correct.

Q Is that correct?

A Yes.

MR. FORSETTA: I object. This has never been established as fact, since we do not have the union contract here.

MR. LINKER: Well this man is the union president.

MR. FORSETTA: Well, I am also a management "institution" and I am familiar with the contract and that is not what the contract states.

MR. LINKER: Well, I've never read the contract. I'm just asking the questions.

Q In your mind, was proper procedure followed in this case?

A No, it wasn't.

Q And ---

HEARING OFFICER MARACHI: Well, let's state that specifically. What wasn't, you know, why didn't the agency follow proper procedures? What is it specifically that they did in this case that violated those alleged procedures?

MR. EVERETT: Whenever a federal employee at the Manhattan VA is involved on inside charges, a union representative ---

HEARING OFFICER MARACHI: I didn't follow you. Whenever - right.

MR. EVERETT: An employee is brought on any charges and being interviewed, they must have someone from the union to represent him.

HEARING OFFICER MARACHI: When he is brought up on charges.

MR. EVERETT: Correct.

HEARING OFFICER MARACHI: What kind of charges?

MR. EVERETT: Any sort of charges - proposed removal, any sort of violation. He is supposed to have a representative from the union.

Mr. Carey.

HEARING OFFICER MARACHI: Mr. Forsetta, do you have any questions on cross examination.

CROSS EXAMINATION

BY MR. FORSETTA:

Q The elimination of the charge against Mr. Petlow, was that based upon the fact that he did not absue sick leave or based upon a technicality?

A It was based upon a technicality.

Q Okay. And the aspect of Officer Kelly, are you prepared to indicate to this group why he, why action was taken against him?

A At this time, no. Because we have a hearing coming up before the Civil Service Commission, I feel it would not be fair for me to discuss it at this time.

Q Well, since you brought up the fact that he was going to be removed, you should tell us why he's been removed.

HEARING OFFICER MARACHI: It doesn't really - you may do that - it really doesn't, you know - his name has come up and we will be having a hearing. What are the stated charges - does it involve patient abuse?

THE WITNESS: Supposedly yes.

Q Mr. Everett, are you familiar with the VA rules and regulations as they relate to charges of patient abuse and the penalty thereof?

HEARING OFFICER MARACHI: No. No.

Q Okay. Would it surprise you if I were to tell you that the regulations so stipulate that if you were to find a case of major patient abuse and major patient abuse can be raising a voice at a patient or striking a patient, that the only action that an agency can take in such cases is removal?

Are you aware of that?

A No.

Q Are you aware that, in Mr. Kelly's case, there were five witnesses who saw him strike a patient?

HEARING OFFICER MARACHI: I don't want to get too far into Mr. Kelly's case at this point?

MR. FORSETTA: Well, it's not the Carey case. It's discrediting this whole aspect of a systematic appraoch to biasedrelated to Mr. Bailey's removal that was developing this case.

HEARING OFFICER MARACHI: You may answer that question if you have knowledge and I will terminate it at this point.

THE WITNESS: No, I don't have knowledge.

REDIRECT EXAMINATION

BY MR. LINKER:

Q At that meetinf of June 21, 1976, when you went to Mr. Bearfield, and complained about the lack of representation, did you also complain about the fact that the two summonses which Mr. Bailey had issued had never been acted upon?

A Yes. I called Mr. "Balley's" attention to it at this time and Mr. Balley said at that time that they were not cancelled.

Q He didn't tell you they were dismissed. Right?

A He said that they were not dismissed. That he was going to ---

HEARING OFFICER MARACHI: That he was acting in any case. We'll rely on this document for all of this witness' testimony.

MR. LINKER: Yes sir.

HEARING OFFICER MARACHI: I don't want to become, you know, too repetitious. We've done some of that already.

Q In this VA Hospital, in particular, on numerous occasions, haven't you had to represent police officers because of incidents involving abuse by patients of them and isn't it a common thing and one of the worst things in a VA Hospital where the patients are abusive to them?

A Yes, it is.

MR. LINKER: No further questions.

HEARING OFFICER MARACHI: Mr. Forsetta, do you have anything further? All right. There being nothing further, Mr. Everett, I'm going to give you my name and you write this down. D. Marachi, M-A-R-A-C-H-I, Assistant Appeals Officer, U.S. Civil Service Commission, Federal Employee Appeals Authority, 26 Federal Plaza, New York, New York, 100037 and it's Room 2339-A.

All right and I think Mr. Linker wants to give you his card. I'd appreciate it if you would forward that document to me as soon as you can and it will be entered into the record. Okay, there being no further questions of you, I thank you for having come down to testify, especially in view of tha fact that you had to wait all day and I appreciate your patience and I'd like to ask you not to discuss your testimony at this hearing, until at least the close of the hearing.

THE WITNESS: Very well.

HEARING OFFICER MARACHI: All right. Thank you, Mr. Everett.

THE WITNESS: Thank you.

(Whereupon the witness was excused and left the room.(

HEARING OFFICER MARACHI: All right. Mr. Linker, do you intend to have the appellant testify at this point?

MR. LINKER. Yes sir.

HEARING OFFICER MARACHI: All right. Mr. Bailey you've observed the hearing procedures. Do you have any objection to taking an oath?

MR. BAILEY: No sir.

HEARING OFFICER MARACHI: Fine. Would you raise your right hand. Do you solemnly swear that the testimony you are about to give is the truth, the whole truth and nothing but the truth, so help you god?

MR. BAILEY: Yes.

LLEWELYN BAILEY

having bee n duly sworn, testified as follows:

HEARING OFFICER MARACHI: All right. Would you state your fullname and former position title for the record.

THE WITNESS: Llewelyn S. Bailey. Hospital Police Supervisor, in Administration.

HEARING OFFICER MARACHI: All right. Mr. Linker, would you like to examine the appellant?

DIRECT EXAMINATION

BY MR. LINKER:

Q Mr. Bailey, where were you born?

A I was born in Jamaica, WEst Indies.

Q And did you have your education there sir?

A Yes.

Q And was there a period of time when you worked there?

A Yes.

Q In what capacity?

A I was a police constable.

Q And could you give us the dates of your employment in Jamaica as a police constable?

A Well, 1959, February of 1959 until 1966.

Q And are you married, sir?

A Yes, I'm married.

Q And did there come a time when you left your employment as a police constable in Jamaica and came to the United States?

A Yes sir.

Q And were you given a certificate of merit, a certificate of good conduct from the Jamaican police?

A Yes sir.

Q Did you have any trouble, any charges against you of any type, nature, shape or form while you were a police constable?

A No sir.

Q Your record exemplary and above board?

A Good sir.

Q How did you come to the United States? When?

A When? November 1966.

Q And what employment, what was your first employment in the United States?

A I worked for the Metropolitan Life Insurance Company on their housing project.

Q In what capacity?

A As a housing patrolman.

Q And for how long period of time?

A I worked from 1967 up to 1974, when I left for the Va.

Q Right. Did you have any problems in any shape, nature and form while you were a housing guard for the Metropolitan Housing Project?

A No sir.

Q There were no hearings, complaints made against you in all that time?

A No sir.

Q And did you apply for a position with the Veteran's

Administration to become an officer and were you interviewed and examined and sent to school and then you got your position. Is that correct?

A Yes sir.

Q When was that that you started work at the VA?

A I started working April 14th, 1974.

Q Where?

A At the Veteran's Administration.

Q Which hospital?

A The Manhattan VA.

Q The one on First Avenue and ---

A East 24th Street.

Q That same one that's involved here?

A Yes sir.

Q What was your title?

A I was a GS-5.

Q Hospital Police?

A Right.

Q And did you subsequently receive a promotion?

A Yes sir.

Q When was that?

A About eight months after.

Q And you were promoted from GS-5 to what?

A To Police Supervisor, GS-6.

Q And did you continue as the Hospital Police Supervisor from that date up until this incident happened, a couple of months ago?

A Yes.

Q Now aside from this incident here, were you ever notified of any adverse action against you because of your conduct?

A No sir.

Q Did you ever receive any complaints to you about your conduct?

A No sir.

Q Have you always conducted yourself properly as a police officer, following the regulations?

A Yes sir.

Q Now, before this one, did you ever have any patients make complaints about you?

A No sir.

Q Did you ever have any visitors make complaints about you?

A No sir.

Q How many summonses did you give out to visitors of patients or toeher people in the two years that you were there?

A I would say about fifty. Probably around fifty.

Q Five-oh.

A One-five.

Q One-five. About 15 summonses during thatperiod of time. Did you also give summonses out for parking, things like that?

A Yes sir.

Q Now, on May 14th, 1976, what shift were you on?

A Four by twelve, sir.

Q And there was, of course, this is all uniformed?

A All unifformed.

Q Now what were the hours, four to twleve.

A Four to twelve.

Q And what was your station as Police Supervisor?

A I usually stayed near the desk in the lobby.

Q I^N^ the loby?

A Right.

QQ What are the visiting hours?

A The visiting hours are 11 AM to 8 PM.

Q Is that clearly posted in large red and white letters?

A Yes sir.

Q Red letters on a white background in the lobby?

A Yes sir.

Q And are the letters testified to, are the regulations on the offenses posted throughout the hospital?

A Yes. They're posted at the main entrance and on every floor by the elevators.

Q And you're directed to enforce those regulations?

A Yes sir.

Q Are you not sir?

A Yes

Q And as you said before, it says will enforce. Is that correct?

A Yes sir.

Q Now, did there come atime when visiting hours ended that night at 8 o'clock?

A Yes sir.

Q Can you tell us what you did thereafter? In your job.

A At 8 o'clock you always see that all the visitors all the patients return to their floor.

Q And then what you do?

A At 9 PM I "scaled" the main entrance door.

Q Yes sir.

A And I turned down the lobby lights. I cordoned off the area by the elevator.

Q Go into that. Tell us what that cordoned off at the elevator area is?

A It's from the passage way down the elevator leading back to the lobby.

Q What do you do?

A I place a stanchion across that section. Place a sign stating that lobby is closed.

Q Now these stanchions that you placed across are connected by the rope. Is that right?

A Yes.

Q Similar to a rope you see in the movies.

A Or in the banks.

Q In the banks. And they can be easily removed?

A Yes they can, from each end. There's a latch at each end, so you can open the latch.

Q And this was placed in the hallway leading from the elevators to the lobby and from the lobby to the elevators. Is that right?

A Yes.

Q Is that about ten feet long?

A Yes, about ten feet long.

Q By the eway, you've been on different hours shifts. Is that correct?

A Everymonth, I'm being rotated. Sometimes days, sometimes evenings. Sometimes midnights.

Q And of course, you've been on 4 to 12 shifts as a supervisor, many days.

A Many days.

Q This was standard procedure to close this area at the elevators sir?

A Yes sir.

Q And are you absolutely sure you did it that night?

Yes sir. Every night I did it. When I'm on the 4 to 12.

HEARING OFFICERMARACHI: Did you do it that night Mr. Schwartz and Mr. Kaswan came down?

THE WITNESS: Yes, I did. At 9.

HEARING OFFICER MARACHI: You did it 9 PM. Was that before they came downstairs?

THE WITNESS: That was before they eme downstairs.

HEARING OFFICER MARACHI: Continue, Mr. Linker.

Q Why did you do that?

A Because we do it, - it's procedure we do at 9 PM.

HEARING OFFICER MARACHI: I think his question was, what did you do then?

THE WITNESS: What did I do?

HEARING OFFICER MARACHI: Yes.

THE WITNESS: There was also another sign with an arrow stating this way out. It was pointing the way from the lobby.

Q Down that same corridor, but in the other direction?

A In the other direction.

Q Is there an exit there?

A Yes, there's an exit. That exit closes at 9 PM.

Q There's a guard stationed there?

A Yes, a guard must be there at all times.

Q Now, to your knowledge, why is the lobby secured in that manner?

A To cut down on trafficking through the hospital, so that you have proper supervision. It's easy to check who enters and who leaves the hospital.

Q Now, have there been occasions in the past when patients have wondered off from the hospital?

A Yes sir.

Q And is that one of the reasons why the lobby is sealed off and the exit doors are locked?

A Yes sir.

HEARING OFFICER MARACHI: I believe we have testimony as to this point, whether the doors are locked or not. Are the doors locked?

THE WITNESS: Yes, the doors are locked. I said that I secure the main entrance doors.

Q Tell us what secure means.

A Well, the revolving door, you lock it with a key, a master key.

Q And are there any other doors there by the way?

A There are two side doors.

Q And are those locked?

A They cannot be opened from the outside.

Q They can be opened from the inside.

A They can be pushed from the inside.

HEARING OFFICER MARACHI: And this would be because of fire regultions, as Mr. Siley testified to.

THE WITNESS: That's right.

HEARING OFFICER MARACHI: All right.

THE WITNESS: But on occasions we have to put one of those ropes around it and hitch it up so that it cannot be pulled from the outside. It would open from the outside.

HEARING OFFICER MARACHI: You may continue, Mr. Linker. Let'stry to get to the incident in

Q question. You had done all of this before th incident with Mr.Schwartz?

THE WITNESS: Oh yes sir.

HEARING OFFICER MARACHI: What were you doing at the time Mr. Schwartz came down. You had just concluded doing these things?

THE WITNESS: No, I was by the desk. At the security station.

Q Tell us, in your own words, what happened with reference to Schwartz and Kaswan?

A While I was there, the time was ten minutes after nine, when I heard talking. So I looked up and I saw a wheelchair patient and another man came into the lobby, from the roped off area. They walked towards the middle of the lobby and stood there talking. I said, sir, no patients are allowed in the lobby at this time.

And they ignored me completely. So I repeated, did you hear me, sir? No patients are allowed in the lobby at this time. This gentlemen who was with the patints, came towards the desk and said to me, don't you ever talk to him like this. Don't you ever talk to him like that. He's a veteran. He's a veteran.

I told him that visiting hours were over at 8 PM and the time is ow 9:10 PM. He had overstood his pass for an hour and ten minutes. So he should leave the premises and this way the patient will return to his room. He said, he rushed back to the patient, and said, did you hear him call me a liar? Did you hear him call me a liar?

Shouting at the top of his voice. And he stood there and was talking to thepatient, so I walked from the desk towards him and I ordered him to leave the premises. And he refused. I asked him to accompany me into the office and he still refused.

So I took him by his arm, his let arm, and started going towards the office with him, when Officer Parker arrived. He didn't want to go in with me, until Officer Parker took him by the right arm and we both escroted him. When we got in the door was closed. It could be myself or it could be Officer Parker whoc closed the door.

We offered him a seat.

HEARING OFFICER MARACHI: Do you recall whether the shade was down?

THE WITNESS: The shade was down. The shade is always kept down. And most of all, that door is always open. Most of the time. I asked for, I told him that I was going to issue him two summonses, one for failure to depart the premises and one for disorderly conduct.

And he started to shout and saying that he didn't do anything. I asked him for his identification, He refused to give it to me. So I told him, if I did not get the identificatin, I would ask, I would arrest him, but instead he showed me his ID in lieu of arrest. Officer parker came in and told him ---

HEARING OFFICER MARACHI: Now was Officer Parker in the room the entire time?

THE WITNESS: No he had gone out at that time.

HEARING OFFICER MARACHI: He had come in with you and then ---

THE WITNESS: He went out.

HEARING OFFICER MARACHI: And then he went back out. Okay.

THE WITNESS: And then he came in and said, why don't you give the officer your identification and he said to write out a summons. Then ha gave it to me. I proceeded to wrote out the summonses. And then, he got up. So I told him to sit down, until I'm finished. So he said that he didn't want to sit. So I continued writing the summonses and then I gaev it to him and left.

Q You allowed him to stand for the rest of the time?

A Yes. He got up after. He sat for a while and then he stand. So I finished writing out the summons.

HEARING OFFICER MARACHI: What about the situation where Mr. Parker, he testified that he came in and that you and Mr. Schwartz were in close porximity to one another. Did this happen, to the best of your recollection?

THE WITNESS: No, it did not. Mr. Schwartz had been talking all the time. But I wasn't responding to him, because you know, I was standing, writing out the summonses and I figured if I kept responding to him it would interfere with my writing of the summonses.

But he was disagreeable because he thinks he shouldn't have gotten the summonses.

HEARING OFFICER MARACHI: Mr. Linker, do you have anything further?

Q When you asked him for the ID, identification, were you standing at that time?

A Yes. I was standing at that time. And he was standing also.

Q And he rfused to give you the ID?

A Yes. At that time.

Q And then Parker came in, you were still standing and asked you for the ID, he asked him to give you the ID and you got the ID at that time?

A That's right.

HEARING OFFICER MARACHI: Were you in close proximity at this point?

THE WITNESS: Yes, were standing pretty close.

HEARING OFFICER MARACHI: Did Mr. Parker come in and sort of separate you?

THE WITNESS: No, he did not separate us, because there was nothing like action in that. He was only trying to concentrate whether to give me the ID or not. I was still waiting.

HEARING OFFICER MARACHI: Was Mr. Schwartz shouting at this point?

THE WITNESS: No.

HEARING OFFICER MARACHI: Washe yelling?

THE WITNESS: He was talking loud, you know.

HEARING OFFICER MARACHI: And were you yelling back?

THE WITNESS: No, I wasn't yelling at him. I only wanted that he gave me the ID.

HEARING OFFICER MARACHI: All right. Continue, Mr. Linker.

Q Prior to that, when you were still outside, did Mr. Schwartz shout then?

A He was talking loud. He called me a liar. But I didn't call him a liar which I told him then. The only statement I made was, did you hear me? No patients are allowed in the lobby at this time. So he just insisted that

I called him a liar.

Q Now back in the office, or at any time, did you ever hit Schwartz?

A At no time at all, did I ever strike him?

Q Did anybody, anybody, that night, Schwartz, Parker or Kaswan ever say anything to you about having hit anybody?

A No, no one mentioned to me about hitting anyone.

Q After they left, after Schwartz left the office, did you go out and see them leave?

A Yeah. I went by the desk and he went to the front door. I think Officer Parker let him through the front door. And thepatient went upstairs.

Q Now, thebest of your recollection, that was May 14th.

A May 14th.

Q To the best of your recollectin, when was the first time that you, Officer Bailey, was notified of any charges against you involving hitting or anything?

A The first time I heard about this was on June 4th.

Q Now, Mr. Bailey, June 4th is ---

A Twenty-one days ---

Q Twenty-one days thereafter. Is that correct sir?

A Twenty-one days.

Q And you're absolutely sure there was nothing said to you ---

A Nothing was said to me.

Q Between the day it happened and June 24th?

A Right. Exectly.

Q Now, did Kaswan, while he was still in the hospital, ever say anything to you?

A No, I never seen him.

Q You never saw him again?

A Until today.

Q Now, you heard Mr. Siley, without producing anything, say that he spoke to you, he's sure, sometime the week after.

A He only spoke to me on the 4th, the 4th of June.

Q Now what happened on June 4th, sir?

A I was off on day off and so I came back June 4th, at 4 PM. So he called me into his office ---

Q Who? Mr. Siley:

A Yes. He told me that there was a complaint against me. So I said, a visitor to this hospital. So I should come to the Chief of Engineering Office. When I got there, I saw Mr. Horton there. He told me that I was accused of punching a visitor to this office and he gave me a letter and he read, stating it I had been gone five days, no disciplinary - five days administrative leave ---

Q That's an exhibit I believe.

HEARING OFFICER MARACHI: You were paid for the five days?

THE WITNESS: Yes, I was paid for the five days. I cameback to work on the ---

Q Excuse me. Now before that, did they ask you to submit anything in writing?

A Yes. He told me ---

Q I mean before June 4th?

A No.

Q You were not told to submit anything in writing. Did they tell you on June 4th to submit something?

A On june 4th, he told me that I should write a statement, stating fairly what happened.

Q And that's the statement that's in the record dated June, that 4 June the way you do it. Putting the month first and the date second. Is that correct?

A Right.

Q That's June 4th when you wrote your report. That's your report.

A Yes.

Q Did you ever get a chance to explain your side of the story?

A Not beyond the report that I made.

Q Did they ever notify you that you could have a union representative or other representative with you at any time?

A No sir.

Q Were you afforded the right to present your side with the union representative?

A No sir.

HEARING OFFICER MARACHI: With the advance that you got that they were proposing the action, did they ever say that you had the right to rebut, orally or in writing?

THN WITNESS: No, that wasnot until the 11th of June. We haven't reached there yet.

Q Prior to June 4th, I'm just ---

HEARING OFFICER MARACHI: All right. Prior to June 4th, you had mt been.

Q When you returned, you were off on this administrative leave, were you were paid. When you returned, what happened then?

A I saw Mr. Siley that morning, on the 11th. He told me that I should not change into uniform. I was assigned to his office, in plain clothes, to do paperwork.

Q Now where were you when you wrote this report dated June 6th?

A I was, at that point, home.

Q And did you bring it back with you on June 11th?

A Yes. No, I brought it back that same afternoon.

Q The same afternoon.

A Yes. Because I wasn't allowed to walk up ---- ---

Q And when you came back you were handed your proposed notice of removal. Is that correct?

A Yes. That evening, the evening of the 11th. Mr. Siley brought me back to the Chief of LEngineering's Office, Mr. Horton, and they gave me a notice of proposedremoval.

Q That is dated June 10th. When you were you issued the letter?

A I got it on the afternoon of June 11th.

Q Right. Mr. Bailey, did you ever punch anyone in the face while you were on the job?

A No sir.

Q I'm talking now about all the years you were in police work.

A All the years I have been in police work, I have never punched anyone in the face.

Q Aside from this, have you ever been charged with that at all?

A No sir.

Q Have you been charged with anything in all those years?

A No sir.

MR. LINKER: I have no further questions.

HEARING OFFICER MARACHI: All right. Could you answer, you were given the notice of porposed , did you reply in writing?

THE WITNESS: No, not in writing. The document said that it could be done in writing or verbally.

HEARING OFFICER MARACHI: Could be done in writing or verbally, and/or verbally. It could have been done both ways.

THE WITNESS: Right.

HEARING OFFICER MARACHI: All right. You did not reply in writing. You had submitted this memorandum and I suppose you felt that that was sufficient.

THE WITNESS: Yes. That same evening I made some copies and I brought one of the copies to Mr. Everett, the representative.

HEARING OFFICER MARACHI: All right, but I'm saying as far as the action itself, didyou ever respond to it in writing after you were given the notice ofproposal?

THE WITNESS: No.

HEARING OFFICER MARACHI: All right. Did you respond to it orally?

THE WITNESS: Yes, we did respond orally.

HEARING OFFICER MARACHI: Was that in the Director's Office?

THE WITNESS: On the 21st of June.

HEARING OFFICER MARACHI: Did you have an opportunity at that meeting to express any of your feelings you had on this removal? The proposed removal.

THE WITNESS: Mr. W shington did all the talking.

HEARING OFFICER MARACHI: But you could have spoken up if you had chosen to?

THE WITNESS: Yes.

HEARING OFFICER MARACHI: Mr. Forsetta, do you wish to cross exaine the witness.

MR. LINKER: Before you go, Mr. Forsetta, I want one final ---

Q The incident of May 24th, that took place as has already been testified to by the union official. Is that correct? These two officers under you brought this engineer Kelly to you?

A Yes. They did.

Q And since that time, you've been told that Kelly has point out the three of you to Horton. Is that correct?

A Well, I couldn't voich for that. I have never heard ---

Q Since that time, on May 24th, what's his name - Carey - has been put on - fired, and you are facing with tis. is thatright?

A Yes.

Q And prior to May 24th, you testified before, you had heard nothing about the incident of May 14th?

A Exactly.

HEARING OFFICER MARACHI: You want to tell us, very briefly, what happened on May the 24th?

THE WITNESS: Yes, I was at the security station ---

HEARING OFFICER MARACHI: Carey and what was the other gentleman's name ---

THE WITNESS: Carey and Petlow.

HEARING OFFICER MARACHI: Carey and Petlow brought in Mr. Kelly.

THE WITNESS: Yes. I heard them shouting.

HEARING OFFICER MARACHI: And what did you do at this point? Did you telephone Mr. Siley?

THE WITNESS: Yes. I called him because I recognized Mr. Kelly.

HEARING OFFICER MARACHI: Okay. And what did Mr. Siley say?

THE WITNESS: I told him what was happening.

HEARING OFFICER MARACHI: What did you tell him?

THE WITNESS: I told him that we have a problem here because Officers Petlow and Carey brought Mr. Kelly in handcuffs.

HEARING OFFICERMARACHI: Why was he wearing handcuffs?

THE WITNESS: Because he was down in the basement and from the telephone, he was using the telephone down there on that flloor, I think, a duration of time. So, owing to the fact that Mr. Kelly hadn't joined the staff, it was night, these officers rquested him what he was doing there that length of time and asked him for some identification.

So he shouted at them and they brought him up.

HEARING OFFICER MARACHI: I see. But you recognized Mr. Kelly?

THE WITNESS: Yes. So I told them to get in the office and take the cuffs off him.

HEARING OFFICER MARACHI: And you called Mr. Siley.

THE WITNESS: I called Mr. Siley.

HEQRING OFFICER MARACHI: And what did Mr. Saley say to you?

the witness: He told me that it's a bad position. How we can give a summons.

HEARING OFFICER MARACHI: If Mr. Kelly was an employee, did he have the right to be using the telephone, didhe not?

THE WITNESS: Yes.

HEARING OFFICER MARACHI: All right. So there would have been no problem normally and the problem was that the two officers didn't recognize him as anemployee?

THE WITNESS: Right. So they questioned him ——

HEARING OFFICER MARACHI: And he became abusive.

THE WITNESS: Exactly.

HEARING OFFICER MARACHI: Then you released Mr. Kelly at this time?

THE WITNESS: I spoke to Mr. Siley and then relased him.

HEARING OFFICER MARACHI: After having talked to Siley?

THE WITNESS: Yes. And Mr. Siley said I should take back the summons. I should take it back and let mr. Kelly go.

HEARING OFFICER MARACHI: And to your knowledge, that's the end of that incident?

THE WITNESS: Well, Mr. Kelly left word with me to have Mr. Siley to bring both men in his office.

HEARING OFFICER MARACHI: He left word with you?

THE WITNESS: Yes. He went away and then he called me back on the phone and he asked me what time the men were working tomorrow. So I told him the same tour. So he said have Mr. Siley bring both men in his office the following day.

So, Mr. Siley did that. So they went up there and the whole incident was squashed.

Q You took off the cuffs as soon as you saw him?

A Yes, I did because I recognized him. I was the one who gave Mr. Kelly - he lives in ---- - so I was the one who was in charge of the keys. I was the one that gvae him the keys. So I knew Mr. Kelly.

Q Did you also stand up for your men?

A Yes. If they're right, I stand up for them.

Q In this case too sir?

A Yes, in this case, I think they were right.

Q And you told that to your superiors?

A Yes.

HEARING OFFICER MARACHI: You say in this case they were right, right insofar as what they did as far as the fact that they did not know him as an employre. If they had found that he was an employee they shouldn't have questioned him to what he was doing?

THE WITNESS: No. Because Mr. "Forcelli" he comes in sometimesafter hours and I recognize him.

HEARING OFFICER MARACHI: They didn't know he was employee?

THE WITNESS: Right.

HEARING OFFICER MARACHI: Let me ask you soomething else. When you were given the advance notice, did you, at that time, request representation? Did you request - who handed you the advance ntoice?

THE WITNESS: Mr. Horton.

HEARING OFFICER MARACHI: Mr. Horton. Did you tell Mr. Horton that you wanted union representation in this matter?

THE WITNESS: No, it was all stated in the body because I rad it - it's all stated in there. You know, I have ---

HEARING OFFICER MARACHI: Right. But you made no request at that very moment to have a union representative.

THE WITNESS: No, I did not.

HEARING OFFICER MARACHI: He just handed you the notice and said please read it and leave?

THE WITNESS: No, he explained it, to me, what it was about.

HEARING OFFICER MARACHI: And then you left.

THE WITNESS: Yes. I left and I made a copy as I said ----

HEARING OFFICER MARACHI: You contacted the union yourself?

THE WITNESS: Yes.

HEARING OFFICER MARACHI: How long after that did you do that?

THE WITNESS: The same afternoon.

HEARING OFFICER MARACHI: Okay. Mr. Forsetta, would you like to cross examine.

MR. FORSETTA: Yes, it's only a few questions.

CROSS EXAMINATION

BY MR. FORSETTA:

Q Just to clarify this point, the advance notice, were you talking about or were you talking about the 10th?

A No.

HEARING OFFICER MARACHI: The 11th.

Q On the 4th of June, you had a meeting with Mr. Horton. Was there any indication that you were in difficulty?

A To me? The letter clearly states that I was purported for assaulting someone. There was a complaint for assaulting someone. They are suspending me five days administratively, not disciplinary.

Q So at that point, it was not a disciplinary action, you're saying?

A It says pending investigation.

Q Do you have a copy of that letter?

MR. LINKER: It's in evidence.

MR. FORSETTA: No, it's not.

MR. LINKER: I put it in evidence. The administrative.

MR. FORSETTA: I couldn't find it.

MR. LINKER: That's why I put it in. To show that it was administrtive.

Q Okay now, sir, on the June 4th date, you had a suspicion that there was maybe some difficulty, but there was no indication that any disciplinary action was going to be taken against you?

A Exactly.

Q Did you feel, at that point,On June 4th, that you

you had something to grieve? That you could file a grievance for something that had happened?

A No, I didn't think so, because I figured they were just going to collect statements to find out what really happened. You know?

Q Okay.

A And they would get in touch with me again.

Q Now at that time, they indicated to you that they wanted a statement from you, your description of whathad transpired.

A Exactly.

Q And you made that, I think you said that day, and you submitted it that day?

A Yes. I brought it back the same day because you know, for a fact, that I came into work and I wasn't allowed to work. I was there helping out and they wanted me to make a statement. So I figured I would go home, sit down quietly, make a statement and then I'd bring it back.

So he told me what I should do and I placed it in an envelope and you know, I did that.

Q Now, is there anything in that statement that you feel was not complete in your statement? Would you say it was an accurate account of what happened?

A Well, maybe there were little things left out.

Q Anything substantial that coud have affected the decision of the hospital?

A No. I don't think so.

Q So what you said there was pretty much, minus a few details, an accurate account of what you were involved iN/

A Exactly.

Q Now, on the 10th of June ---

A Not the 10th, the 11th.

Q The 11th of June after the investigation was conducted, and your statement was taken along with the statement by the other people, there was an indication that they were going to remove you?

A Yes. It was proposed.

Q There was a proposed removal and in that they told you what your rights were, in terms of representation, in terms of appeal. What did you do at that point?

A It went on to say the final decision was made by the Director.

Q Now, so at that point, you realized that there was a proposal for disciplinary action to be taken against you and you had the opportunity, at that point, to try to answer it. You went to the union and said, they're prro proposing an action against me. Right.

So at that point, you had something to grieve.

You said before that you had nothing to grieve ----

MR. LINKER: I object to that. I'm holding the June 4th statement in my hand.

MR. FORSETTA: And I indicated that and I think that at least Mr. Bailey indicated, and if he wants to change it he can, that that was nota disciplinary action. There was no disciplinary action taken there. There is an indication that there is an allegation taken against this man and that they asked him to present evidence and that they wouldbe conducting an investigation.

MR. LINKER: Do you want to argue with that? I mean obviously, he should have been notified immediately that he could invoke his grievance procedures when he was given this June 4th and thrown off the job, even though - he was sent home.

HEARING OFFICER MARACHI: Administratively - I'm not quite sure whether that would count as a disciplinary action. Disciplinary action by definition would be something that was done because of disciplining an employee for something and there is no indication in any way that he was disciplined. He got five days pay and didn't have to report to work for five days. I'm not quite sure whether that would constitute any kind of discipline.

Would you continue?

BY MR. FORSETTA: (Continuing)

Q All right, so then on the 11th, when you were given notice of proposed removal, that's when you contacted the people - I'm talking about your representative - did you tell the rpresentative that you wanted to grieve the action that the hospital was taking?

And my understanding is that the next course of action open to you was to go to the hospital after, with your representative, which you did go, to present your case.

A Tight.

Q And you could offer anything that you felt or the union representative felt was not offered. You were afforded that opportunity.

A Yes, I was there and Mr. "Balyo" stated at the time that he wasn't fully aware of what was in the proposal. He had knowledge about be whole incident. He would review it. And come to a "signing", etc.

Q But you were afforded an opportunity to add, embellish or do whatever you wanted - I mean, no one inhibited yu from stating what happened. No one said look, we have your statement. We don't want to hear from you anymore. You were afforded that due process at that meeting.

A Yes, because Mr. Washington was there on my behalf.

Q The only other questions I have - and if you feel you should cut me off - this has to do with Officer Parker entered the lobby, you indicated on direct examination that - I shouldn't say you indicated - let me correct myself. You did not indicate that he had intervened when you were in the lobby with Mr. Schwartz.

A No. When Officer Parker arrived I was heading to the room with Mr. Schwartz.

Q So Officer Parker never intervened and said, let's calm down ----

HEARING OFFICER MARACHI: Well, okay, then Officer Parker assisted you ---

THE WITNESS: Right. Exactly.

HEARING OFFICER MARACHI: Did he at any point, just intervene and say, let's the man go home?

THE WITNESS: No, he didnot say that sir.

Q And also according to your direct testimony, when you were in the room, Officer Parker did not separate you and Mr. Schwartz?

A No. He didnot. He came back in and told him to give the Officer your ID, because he has to write out a violation notice.

Q And also referring to your testimony, the shade was never up?

A The shade was never - that shade is always kept down.

Q It was always down. It was never up. Okay.

HEARING OFFICER MARACHI: All right. Mr. Linker, do you have anything?

REDIRECT EXAMINATION

BY MR. LINKER:

Q On June 4th, when you had your first knowledge of the incident of May 14th, that there were charges against you, when - were you told then ---

HEARING OFFICER MARACHI: Wait a minute. Repeat that question.

Q Yes. One June 4th, 1976, when you received Exhibit 2 ---

HEARING OFFICER MARACHI: Right.

Q On June 4th, when you received Exhibit 2, were you told that you had a right to have a representative institute grievance procedures on your behalf?

A No sir.

HEARING OFFICER MARACHI: Were you told that you should secure counsel or help because an investigation was pending against you and you should secure help?

THE WITNESS: No sir.

HEARING OFFICER MARACHI: Were you told that there was an investigation being conducted into the matter?

THE WITNESS: Exactly.

MR. LINKER: No further questions.

HEARING OFFICER MARACHI: All right. Mr. Forsetta. You were here when Mr. Mitzner testified that that shade was - to your knowledge was that shade on the evening of question, was it working? If you pulled it, did it go up and down or not?

THE WITNESS: If you pulled it, I think it would, but I never tried, because as I said, that shade was always down.

HEARING OFFICER MARACHI: Have you ever had occasion to pull it up or down?

THE WITNESS: No sir.

HEARING OFFIER MARACHI: You did not. Okay. There being no further questions of you ——

MR. LINKER: Just a moment.

Q Were with you me yesterday?

A Yes, I was with you yesterday.

HEARING OFFICER MARACHI: Let him change the tape.

(Whereupon a recess was taken to change the tape.)

HEARING OFFICER MARACHI: Please continue.

Q You were present yesterday with myself and Mr. Mitzner in the office, right?

A Yes sir.

Q Mr. Siley was present part of the time?

A Yes.

Q And in everybody's presence, Mr. Mitzner removed the shade and attempted to raise it.

A And it did nothng.

Q And then he removed it and tightened it.

A By rolling it.

Q By rolling it and then put it back in and then brought it back down and it started going up as he was pulling it down. Is that correct?

A Yes sir.

Q And he proceeded to touch it with his elbow?

A Yes, he did.

Q And ----

HEARING OFFICER MARACHI: Did it go up when he touched it with his elbow?

THE WITNESS: No, it did not.

HEARING OFFICER MARACHI: Were you and Officer

Parker the only two hospital police offiecrs involved in this inciednt? Was anybody else involved?

THE WITNESS: No sir.

HEARING OFFICER MARACHI: There was only the two of you.

THE WITNESS: The officers were on post. One was in the "left" and was one in the ---

HEARING OFFICER MARACHI: They at no time came into the office?

THE WITNESS: No sir.

HEARING OFFICERMARACHI: Are there any further questions from either side? There being no further questions, Mr. Bailey, you may resume your seat.

(Whereupon the witness was excused.)

HEARING OFFICER MARACHI: Are we prepared for closing statements at this time?

MR. FORSETTA: Yes.

HEARING OFFICER MARACHI: As I indicated earlier, I have left the record open for ten days for Mr. Evereett to submit the union agreement to me and you, I understand Parker has his own copy and at the conclusion of the op closing statements, the record will be closed for all purposes except for admission of that document, if it comes in within the ten day period. If it does not come in within the tendays, then the record will be officially closed without it.

MR. LINKER: May I have permission to submit a written closing statement? It's five to six now and I think it would be a littoe difficult for me

HEARING OFFICER MARACHI: Mr. Forsetta, would you prefer a written closing statement also?

MR. FORSETTA: I will read my statements.

HEARING OFFICER MARACHI: It will be oral statements. Mr. Linker, would you like an opportunity to get your closing statement in order?

MR. LINKER: I don't really think it's necessary.

HEARING OFFICER MARACHI: Okay.

MR. FORSETTA: The Veteran's Administration has documented in this case, that the action taken against Officer Bailey was indeed appropriate and probably the only course of action left to the agency. It was well established in the testimony giv3n by Mr. Schwartz, Mr. - Officer Parker, and Mr. Kaswan, that particularly Mr. Kaswan and Mr. Schwartz, that Mr. Bailey did indeed strike Mr.

Mr. Schwartz. The striking was witnessed by Mr. Kaswan.

That Officer Parker indicated, by his testimony, that he had to intervene in the situation, although he did not witness the striking. He had to separate the two after the alleged incident of striking transpired. Officer Bailey's testimony - Mr. Bailey's testimony differs substantially from the testimony offered by the three witnesses and also the testimony offered by Mr. Siley.

I also believe that it also has been demonstrated that Mr. Bailey was afforded due process. That on the day in question, particularly the 4th of June when he was given an indication that he was going to be placed on fve day's administrative leave, that that would not constitute a grievable item and the agency was under no obligation to indicate to him that he should seek a representative, since no disciplinary action had been taken against him.

And he - certainly if he felt that disciplinary action had been taken against him, he certainly had the opportunity to go to any representative that he so desired. I think it was his feeling that this would not happen, that nothing was going to transpire. And so theagency at that time, did not know what was going to happen until the formalized investigation.

On the 11th, when the investigation was formalized, he became obvious that displinary action was going to be taken against Officer Bailey, he was afforded every opportunity. The opportnity was consistent with rules and regulations and was afforded in the contract and was so stated in the document that was given to him.

He was afforded the oppotunity of using the hospital records. He was able to "add" his case. He had a representative. He could put forth any evidence that had not been presented. He apparently chose not to do so and the decision went through the process and the hospital upheld the investigation that was conducted.

On the basis of the evidence in the record, I think that the Civil Service Commission should uphold the decision of the agency to enforce the removal of Officer Bailey or Mr. Bailey.

HEARING OFFICER MARACHI: Thank you, Mr. Forsetta. All right. Mr. Linker.

MR. LINKER: I'll do it now. I think you mentioned at the beginning of the hearing, I think my reading showed just before, that the burden, even though this has been appealed by Mr. Bailey, the burden of proof is still on the agency and they must preponderate in your favor against Mr. Bailey.

Now cutting through everything, the only charge here is whether or not Mr. Bailey punched Mr. Schwartz and that's the only charge against him. If by preponderance of the evidence, we showed that Mr. Bailey did not assault Mr. Schwartz by punching him in the face. The charges must fall.

One thing is for usure. Mr. Schwartz never sought any medical treatment. There was no medical treatment for his injuries and Mr. Schwartz was right in the hospital. Another thing is for sure. Mr. Schwartz never told Mr. Parker that he had been struck in the face. According to both of them.

How could the man have been struck in he face and Schwartz was outside, see it, if we assume that the shade was down. He could not. It's only Parker's testimony that the window was open at all times. Put that in abeyance forthe moment. Let's turn to Mr. Kaswan's statement that the shade was down when they went in. Put down by Mr. Bailey. And that a subsequent interval, he's sitting there and he sees the shade go up for a moment. Then Mr. Bailey strikes Mr. Schwartz and then Mr. Bailey turns around andpulls down the shade and takes him back in.

We have Mr. Mitzner's testimony that that's impossible. That shade would not go up when struck. I think common sense would indicate that that could not happen tht way. I think anyone would take an ordinary shade and bang it with their elbow and it would spring up. I think Mr. Mitzner's testimony shows for a certainty that this particular shade wouldn't spring up and Mr. Siley informed him yesterday that that was the same shade that was there at all times.

Even if by some stretch of the imagination, that shade went up, only a lunatic would think in full view, with the shade up, strike a man in the face and then turn around in full view as someone has testified and was probably was sitting outside and lower the shade and go back inside. So much for Mr. Kaswan.

Who in summary has testified that he immediately said after Mr. Schwartz came out and showed him the summonses that he was going to go all the way for him. I will support you any way I can. About 9:30 he says, Mr. Schwartz came out and had two summonsse for federal court. I was absolutely appalled. Harold, I will support you any way I can. And he goes upstairs and writes the statement out.

Which was never turned in by Mr. Schwartz until the meeting of June 3rd. He says he wrote it on May 14th. Then, we have the version of Mr. Schwartz, who testifies that his elbow struck it and it went up - Mr. Kaswan never know how the shade went up - but that it went up so he corroborated it. But he had that story of his elbow striking it.

Now, I ask you to recall the testimony as to where they were standing. Him testifying on the side, he was facing toward theright and Bailey facing toward him. That's contradictory with Mr. Schwartz' testimony that the back of Mr. Baiby was to Mr. Schwartz. Mr. Kaswan didn't want to admit to seeing Mr. Schwartz facing him, also in contradiction. You have that contradiction when people are making up storeis.

If this man actually struck Mr. Schwartz, Mr. Schwartz would have gone down or gone back or Mr. Schwartz would have told other people about it, namely Mr.Parker and anyone else that was in the vicinity or after being giving the summonses, he would have gone for some kind of treatment.

With so much at stake, with the window shade up, is this man going to strike somebody? Then we have Mr. Parker and we have Mr. Parker who admits, right on the record, that although Mr. B iley has never done anything wrong, Mr. Bailey is his supervisor, who he doesn't like. Right on the record, a witness admitting his own dislike againsy a witness.

And of course, bias on cross examination is always something that can brought out. Right on the record, he admits it. Yet, Parker doesn't go all the way. He doesn't go to the extent of saying he saw Bailey hit anybody. I don't know where he got this story the window shade was open at all times. This is - Mr. Siley states that it was down all the time. Mr. Bailey said it was down all the time and only Parker, Schwartz and Kaswan said it waspulled down.

I think Schwartz said it was done and Kaswan said it was pulled down. But albeit, he says he was told, oh my god, didyou see him. When he turns around, he's right there by the door and he doesn't see it. Doesn't see the man get hit andhe goes inside, according to his testimony, and doesn't go into anything in detail about it and then at one point, he was asked directly, was Schwartz said anything about being hit and I think he may have missed the word at first, but the he says, no. No, Schwartz did not say anything that he was hit. And certainly the first thing that wouldhappen if Schwartz had been hit, when Parker went into that room, Schwartz would have yelled out he was hit.

Certainly a man like Mr. Schwartz would not be reticent about being hit and in fact, on the contrary, when Mr. Parker went in, Mr. Schwartz, according to Mr. Parker was talking loud and clear. In fact, they were right next to each other and they were talking and Mr. Bailey said something about it also - about the identification.

And it was only after the identification was given, much, much later, that Schwartz testified that the hitting happened. So there is a direct contradiction there. A terrible contradiction between Schwartz and Kaswan. Kaswan's testimony has to be, if it happened as he said, before the identification. Schwartz' testimony, on the other hand, has to be long, long after the identification, because as he says, long after the identification was submitted, then he got up from there because of the long period of time doing the summonses, he had started to go out to see how his friend was doing and it was then that the shade went up and he was hit.

Now Kaswan and Parker's testimony, taken in conjunction, has to be, if it happened, which it didn't, before the summonses were issued. Now, Bailey had an absolute obligation and a perfect right, not an obligation, but a perfect right to issue the summonses. Chief Siley testified that these directions are posted all over the place with the offenses listed clearly on them and the 11 to 8 Chief Siley says it was there.

And Bailey testified that that meant before they came in, he kept a diary. I think that Parker was not sure thatthe diary was not there because he wanted to get to the place, but Bailey testified that the diary was there and Siley testified that that diary should be there and if it's not there after closing, he would report it.

And everybody admitted that the lights were dim in the lobby and everybody admitted that nobody was there except for Mr. Kaswan who said there was some one person sitting over in a corner somewhere. They must have known there was something wrong when they went into the lobby. And certainly after Mr. Bailey, a police officer in uniform, told them to leave, all he had to leave. All the patient had to do was go upstairs and leave and it would have been over.

And Parker's statement that the man told to keep quiet was the unknown man, who was Schwartz. You have witnesses supposedly talking about the only charge, is the striking in the face. It looks like to me which is something that is inherently incredible that it should happen. On the other hand, you've got Mr. Bailey, who has so much at stake, has never been in the slightest trouble, in his entire life.

Never hit anybody in his life. But his entire charge, his Civil Service Carrerr and everything else just being put up for grabs with him not having - I mean what kind of assault could it be? The man's never even gone to the doctor, never even had any treatment.

Nothing in the statement about any bruises or marks on his face. On my cross examination here, he says, he had marks on the face. But Kaswan says that he saw nothing, nothing wrong on his face, nothing whatsoever. And if there was anything wrong on his face, you could bet that he would have told Parker and went for treatment.

So much for the "reception" part of the case. And jursidcitionally, despite the argument of my learned adversary, here we have a situation where the only documents we have, the documents in evidence, shows that the first inkling, according to his testimony and the documents, the only inkling the man had wasnot until June 4th, June 4th, 1976, that there was anything wrong with what he had done that date.

June 4th from May 14th. How many days? 21 days. And here we have according to Mr. Siley, an investigation which was instituted on the 17th, which was a Monday. Not a document. Not a document about it. Against him. There is 21 days and June 4th comes and even on June 4th, he's given notice of administrative removal and nothing to him about his rights. Nothing about his greivance procedure.

Nothing to him about he better get some defense going. You'd better get a hearing representative. Nothing. A complete lack of due process. Not until as it turned out, nothing until he comes back from his administrative leave and he's given the notice of proposed removal, dated June 10th, which he received on June11th, is he told about the procedure.

At this time, you can see, it was a foregone conclusion that how the decision was going to be and how everything was going to be. Then the union goes up, they're not even given a statement according to the union official, of the proposed charges against him. The investigation report contains it. They're not even given a copy of the investigation report. It was in the file here.

They were just given a short statement and had a right to go through the proper grievance proceedings. And then you heard about the other incident in which the union officials has nothing to gain by it, seems to be pretty certain that there is some kind of a little vendetta going on against the hospital police officers by the Engineering Dept. in which strangely enough we find the Assistant Chief Engineer is the head of the Police Department and one of his assistants, Chief Engineer Kelly, involved in an incident with the housing police and from that time on, all of a sudden, we havetwo of them fired and one of them brought up on charges, which on a technicality are dropped. Thank heavens. I'd hate to be in his shoes.

I started with the "seption" of charges and I'll just briefly finish with the seption of charges. Can a man have his job taken away from him, can a man be fired on allegations of that type, on a so-called striking of face where there is not the slightest injury, documented in jury to the person, to the so-called victim, Can charges be filed in that manner where there is absolutely no truth in any court they would not give assault, because there would be no injury. In criminal court.

A Charge without injury, without a doctor's report. That's aside from the discrepancies in the testimony, it just couldn't have happened. It just couldn't have happened. The way Schwartz testified it happened inside . The way Schwartz said it happened inside namely from the backing of the elbow and the way Kaswan on the outside had to be corroborated by it. That's the only way the shade could have gone up. I mean, you know, they had to think of something. So they got together and they thought of that and Kaswan made his statement long after the incident and Schwartz made his statement, long, long after after the incident. In June. It's dated the early part of June.

He had to show some way - some way - that that shade went up and that's where he, the lack of substance to the charge coes in, because when there's changing around or something going on, it has to be a weakness and that was the weakness. How on earth could a shade go up when being struck by a man's elbow?

We ask that the burden of proof which the VA has respectfully submitted has not been sustained.

HEARING OFFICER MARACHI: All right. I thank you both and as I indicated earlier, at the end of the hearing, the record will be officially closed with the exception of the document to be provided by Mr. Everett, provided it is provided within ten day. Thank.you.

(Whereupon the hearing was officialy closed.)

WITNESSES:	D	R-D	C	R-C	H.O.
Harold Schwartz	10	69	23		21 65
Joseph Kaswan	72		81		
William Parker	112	193	166		157 166
Samuel Mitzner	197	209	204		208
Michael Everett	212	233	231		220
Llewelyn Bailey	236	270	263		256 258 271

EXHIBITS:		PAGE
#1	Rules and Regulations of VA Hospital for visitors	125
#2	Memo dated June 4, 1976 to Mr.Bailey	174
#3	Document not identified for record	179
#4	Document not identified for record	215

C-E-R-T-I-F-I-C-A-T-E

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

I do hereby certify:

That I was present at the above proceeding and made a verbatim record of everything spoken except as directed by the Hearing Officer presiding.

That the foregoing pages are a true and complete transcript of the record made by me in my capacity as Reporter.

B. Wayne
(Reporter)

UNITED STATES CIVIL SERVICE COMMISSION A 299
FEDERAL EMPLOYEE APPEALS AUTHORITY
New York Field Office
26 Federal Plaza
New York, New York 10007

APPEAL OF LLEWELYN S. BAILEY

UNDER PART 752, SUBPART B, OF THE CIVIL SERVICE REGULATIONS

DECISION NUMBER NY752B70014

DECIDED ON OCTOBER 22, 1976

INTRODUCTION

Name of Appellant:	Llewelyn S. Bailey
Date of Appeal:	July 7, 1976
Department, Organization and Location:	Veterans Administration Veterans Administration Hospital 408 First Avenue New York, New York 10010
Action Appealed:	Removal from position of Supervisory Police Officer, GS-083, Grade 6, Step 1, $9,946 per annum.
Effective Date:	July 13, 1976

BASIS FOR ACCEPTANCE

The appellant was a career-conditional employee serving in a competitive position who had completed one year of current continuous employment. His removal constituted an adverse agency action as defined by Civil Service regulations. His letter of appeal, dated July 7, 1976, received in this office on July 12, 1976, was timely filed. Accordingly, the appeal was accepted as within the purview of part 752, subpart B, of the Civil Service regulations.

EXHIBIT B

APPELLATE RECORD

After gathering evidence on the basis of which to adjudicate the appeal, a copy of the record was, on August 4, 1976, forwarded to appellant's designated representative. Thereafter, at appellant's request, a hearing was held in New York, New York, on September 14, 1976. The appellant was present and was accompanied by his representative, Julian Linker, Attorney. The agency was represented by James Farsetta, Hospital Administrative Officer. A verbatim transcript of the hearing was prepared and a copy thereof is transmitted to the parties together with this decision.

ANALYSIS AND FINDINGS

Procedures

The record indicates that appellant was notified, by letter dated June 10, 1976, hand delivered to him on the following day, signed by Michael A. Horton, Chief, Engineering Service, of a proposal to remove him from his position, based on the following reason:

> I. On May 14, 1976 at approximately 9:30 p.m. you struck Mr. Harold S. Schwartz, a visitor at the hospital, in the face with your fist. Your action was witnessed by Mr. Joseph Kaswan, a patient at the hospital.

This advance notice further advised appellant, in pertinent parts, that the proposed action would not be effected in less than 30 calendar days; that he had a right to reply to the notice both personally and in writing; that he would be afforded "until the close of business on June 23, 1976 to reply to these reasons..."; that "The evidence on which this notice of proposed action is based will be available for your review in the personnel office of this hospital"; that he would "be allowed 8 hours of official duty time for reviewing the evidence relied on to support the reasons in this notice, preparing a written reply, securing affidavits, and for making a personal reply"; and that he would be retained in an active duty status during the period of the advance notice.

On June 21, 1976, appellant and two union representatives presented an oral response to the proposed action. Appellant did not reply in writing.

Thereafter, by letter of decision dated July 2, 1976, signed by Peter Baglio, Hospital Director, appellant was advised that after careful consideration of all the evidence, including his personal reply, it had been decided that "Reason I as stated in the notice of proposed removal is sustained," and that he would be removed effective on July 13, 1976. Appellant was advised of his right of appeal to the Federal Employee Appeals Authority.

At the hearing on September 14, 1976, appellant's representative contended that the adverse action herein was fatally procedurally defective because: (1) the agency had not afforded appellant a pre-termination hearing and had, thereby, violated his due process rights; (2) the advance notice had not contained any and all reasons for the removal, to wit, appellant had, on May 24, 1976, been involved in an incident wherein a supervisor in the Engineering Department had erroneously been handcuffed by two Hospital Police Officers and brought in to the security office; that the Engineering Department has jurisdiction over the Police Department; that since this incident, the appellant and one of the officers have been brought up on charges and separated and the agency had unsuccessfully sought to suspend the second officer; and that the real reason for appellant's removal was his involvement in this incident; and (3) the agency had, in violation of the union agreement, failed to apprise appellant of his right to a union representative in this matter.

With respect to the first contention cited above, there is no requirement in the Civil Service regulations that an agency provide an employee with a pre-termination hearing before the removal action is effected. Moreover, while the FEAA is not the proper forumn for the adjudication of this issue, in the case of Arnettev. Kennedy, 416 U.S.134 (1974), 42 U.S.L.W. 4513, the Supreme Court rejected this very same contention.

In regard to the second contention raised by appellant's representative, appellant himself testified that he had immediately recognized the individual in question, had the handcuffs removed, and released him shortly thereafter (Tr. p. 259). Further, there is no credible evidence that appellant had, in any way, been blamed for the incident; or that this incident played any role, whatsoever, in the adverse action herein. We therefore find no basis, in fact, for this contention.

As concerns the third contention, a copy of the union agreement has been made a part of this record, and upon careful and close examination of this agreement, we find the assertion by appellant's

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representative to be totally unfounded. To the contrary, Article III of said agreement specifically excludes the application of grievance procedures "where laws, Executive Order, CSC regulations or VA regulations mandate separate procedures." Moreover, even the Grievance Procedures outlined, i.e., section 3.03 of the agreement, indicate only that an employee has a right to representation during said procedure; there is, however, no provision requiring that the agency apprise the employee of such right. Accordingly, we also find no basis, in fact, for this contention.

um of procedure

In summary, the record reflects, and we so find, that appellant was issued a proper advance written notice of at least 30 calendar days, citing the reason for the proposed action with sufficient specificity and detail to permit adequate refutation; that he was provided an opportunity to review the material relied upon in support of the action; that he was advised of his right to reply to the advance notice, both personally and in writing; that his personal reply was considered; and that he was issued a timely written notice of decision, by a higher level official of the agency, together with reasons therefor and his right of appeal. Accordingly, we find that the agency has fully complied with the procedural requirements of part 752, subpart B, of the Civil Service Commission's adverse action regulations.

Merits of the Action

The evidence of record shows that on the evening of May 14, 1976, Harold S. Schwartz had been visiting Joseph Kaswan, who was then a patient at the V. A. Hospital. Mr. Schwartz testified, at the hearing, that about 10 minutes to 9:00 p.m., a nurse came in and told him visiting hours were over and he'd have to leave; whereupon he, accompanied by Mr. Kaswan, who was in a wheelchair, went to the lobby and proceeded towards the exit (Tr. p. 11). While there is some conflict in the record as to the exact time Messrs. Schwartz and Kaswan arrived in the lobby, the time frame as attested to by all the witnesses would appear to have been between approximately 9:00 p.m. and 9:10 p.m. Appellant alleged the latter. Mr. Schwartz acknowledged that visiting hours were over and had, in fact, ended at 8:00 p.m., but contended that he and Mr. Kaswan were involved "rather deeply" in conversation and had not noticed the time (Tr. p. 11).

In any case, as Messrs. Schwartz and Kaswan approached the reception desk, the appellant allegedly said, "sir, no patients are allowed in the lobby at this time" (Tr. p. 246). This statement was not allegedly heard by either Mr. Kaswan or Mr. Schwartz; the former reportedly suffers from a service-connected loss of hearing.

Mr. Kaswan testified that he then said, "I'm sorry, I didn't hear you" (Tr. p. 74). The appellant allegedly repeated the statement, but "I still didn't hear him. So, I said, I'm sorry I still didn't hear you" (Tr. p. 74). Appellant then allegedly replied, "loudly this time, you heard me. You only hear what you want to hear" (Tr. p. 74). Mr. Schwartz allegedly retorted, "you have no call to make such a statement...you're calling the man a liar without cause" (Tr. p. 12). A loud argument between appellant and Mr. Schwartz reportedly ensued, and a second Hospital Police Officer, William O. Parker, heard the shouting, upon exiting from the elevator, and immediately "ran" to the scene (Tr. p. 132). Officer Parker testified that he then sought to calm down both the appellant and the unknown visitor (Schwartz), and then told appellant, "Just let him out" (Tr. pp. 120 & 132). According to Officer Parker's testimony, Mr. Schwartz started to leave but as he was approaching the door, he said something, which was inaudible to him, and "(appellant) went up to him and started talking again. Then (appellant) asked him to come inside the security office. And he said he would not because he didn't do nothing" (Tr. p. 114). Appellant denied that when Officer Parker arrived in the lobby, he had intervened and said "let's calm down" or that he said "let the man go home." Appellant contended that Officer Parker merely assisted him in bringing Schwartz to the security office (Tr. p. 269).

After some brief protests, Mr. Schwartz was escorted by the two Officers to the security office, asked to produce identification, and issued two violations for: (1) failure to depart premises, and (2) disorderly conduct. It is during this time frame of approximately 20 to 30 minutes duration that both Messrs. Kaswan and Schwartz allege that the latter was punched in the face by the appellant. There is, however, some conflict, in the testimonies of the various witnesses, as to the events which transpired while Mr. Schwartz was in the security office.

Mr. Kaswan testified that he remained outside the office and about 10 minutes after Schwartz, Parker, and appellant had entered, the door was closed and shade pulled down; that about two minutes later the shade flew up, and "I saw his (appellant's) fist strike Mr. Schwar[illegible]' face" (Tr. p. 96). He further stated that guards were coming in and going out of the office during the said 12 minutes, but that, at the time of the altercation, Mr. Schwartz and the appellant were alone (Tr. p. 96). He did not recall saying anything to any officer at the time of the striking (Tr. p. 99).

Mr. Schwartz testified that upon entering the security office the door was closed and the shade, which covered the glass top, pulled down (Tr. p. 16). He states that after about 10 minutes, "I was getting fidgety. At this point neither of the two guards were in the room. I walked towards the door and I said I want to let my friend, Joe, know that I am still here and I reached out" (Tr. p. 19); whereupon appellant allegedly rushed towards him "Pulled back his right arm, as he did that, his right elbow struck the door, struck the shade and the shade went flying up. This was preparatory to hitting me in the face, which he proceeded to do and grab me and drag me back to the chair" (Tr. p. 20). Mr. Schwartz could not recall if anyone entered the room during the altercation (Tr. p. 21). He also stated that he got hit once, "Right in the jaw"; that he did not fall down; and that he did not seek or obtain any kind of medical treatment afterwards (Tr. p. 22). He further stated that after he got hit the shade was pulled down again, and appellant finished making out the summonses, returned his identification and left (Tr. pp. 20 & 55).

Officer Parker testified that once appellant had been brought to the security office there was more talking and shouting; that Mr. Schwartz did not want to relinquish his i.d.; that he then went to talk to Mr. Kaswan who was "hollering" outside the office (Tr. pp. 114-115 & 136); and that Mr. Kaswan suddenly said, "Oh my god. He's hitting my friend...So I went back and... separated (appellant) and Mr. Schwartz" (Tr. p. 115). Officer Parker stated that he did not see the appellant hit Mr. Schwartz, but did characterize the exchange as "heated" (Tr. p. 19); and also said that when he reentered the room, "They were standing face to face..."(Tr. pp. 115-117). In addition, he testified that the "shade is always up"; and that to the best of his recollection, neither he nor the appellant had pulled the shade down (Tr. p. 135).

Appellant testified, in pertinent parts, that he had a "good" record as a police officer (Tr. p. 237); that officer Parker had, after assisting him in escorting Mr. Schwartz to the office, left and then returned and said, "why don't you give the officer your i.d. to write out the summons" (Tr. p. 248); and that Mr. Schwartz had sat for a while and then stood up for awhile (Tr. p. 248). He denied, however, that he and Mr. Schwartz had to be separated by officer Parker, or that he ever struck Mr. Schwartz (Tr. pp. 249-50). He also stated that the shade is always down (Tr. p. 247); and that other officers were on duty but that Parker was the only one involved in the incident (Tr. p. 272).

The Chief of the Security Section, David R. Siley, testified that on May 17, 1976, he received a communication from the Acting Hospital Director indicating that he had received a complaint from a Mr. Kaswan against a Hospital Police Officer (Tr. p. 157); that the complaint was essentially that appellant had assaulted a visitor (Tr. p. 158); that he spoke to appellant about the matter during the week of May 17-19 (Tr. p. 159); that he spoke to officer Parker about it a few days later (Tr. p. 160); and that Parker had said, "as he was leaving...the shade had gone up and Mr. Kaswan, who was sitting in front, said, oh my god. He hit my friend" (Tr. p. 161). Mr. Siley stated that according to his understanding of what Parker had said to him, the alleged altercation occurred after Schwartz relinquished his i.d.

Chief Siley further stated that on June 3, 1976, Messrs. Kaswan and Schwartz came to the hospital to see the Chief of the Internal Service, and that he had sat in on the conversations (Tr. p. 163); that he apprised appellant of the serious nature of the charges against him on June 4, 1976 (Tr. p. 163); and that while a third officer had been on duty that night, when questioned, he had no knowledge of what had happened (Tr. p. 183). Chief Siley also stated, at first, that the shade is always up, but then reversed himself and said, "Its up on some occasions... But on most occasions its down"(Tr. pp. 192-3).

Testimony was also admitted at the hearing from: Michael I. Everett, President, A.F.G.E., Local 29; and Samuel B. Mitzner, who purported to be a free lance housing consultant. The former's testimony dealt with the procedural errors discussed supra. The latter testified that he had on September 13, 1976 visited the hospital at approximately 4:00 p.m. (Tr. p. 199); that he had observed the shade on the door of the security office to be down at the time (Tr. p. 199); that he had "hit it several times...to see whether the shade moved..." (Tr. p. 200); and that it would not go up. Mr. Mitzner also stated that the glass pane behind the shade was "pretty thin" and not shatterproof (Tr. p. 201). He did, however, acknowledge that the shade had gone up after he removed it and tightened the mechanism, and that he could not attest to the shade's functioning on the day of the incident (Tr. pp. 209-210).

After a careful and thorough review of the testimonies of the various witnesses at the hearing, their prior statements (when applicable), the agency's investigative memorandum dated June 25, 1976, and, in short, the entire record, we find the following:

(1) That of the four witnesses who were present during the alleged altercation, regardless of how the shade went up or whether it was up the whole time, the only one who alleged it was down was the appellant;

(2) That Mr. Mitzner was not present at the time of the incident, and his testimony does not preclude the possibility that the shade did go up, as alleged;

(3) That although officer Parker's testimony is not totally consistant with that of Messrs. Schwartz and Kaswan, his testimony, insofar as many of the important aspects of the incident, is in substantial conflict with appellant's, and does lend credibility to the allegation that appellant hit Mr. Schwartz, and;.

(4) There is no basis to doubt the credibility of the testimonies of Messrs. Schwartz and Kaswan.

Accordingly, we find that the agency's stated reason for the removal action is sustained by a preponderance of the credible evidence of record.

Finally, in view of appellant's contention of a "good" prior record, we have considered this important mitigating factor, but find that the penalty of removal was not, in view of the serious nature of the sustained reason and the duties and responsibilities of appellant's position, an abuse of agency discretion or unduly excessive.

CONCLUSION

In summary, we conclude, based on a preponderance of the credible evidence of record, that the agency's stated reason for the removal action is sustained; and that the penalty of removal is not, under the circumstances herein, unreasonable, arbitrary or capricious, but is for such cause as will promote the efficiency of the service.

DECISION

The removal action is affirmed and the appeal therefrom is denied.

Section 772.309(b) of the Civil Service regulations provides that the decision of the Federal Employee Appeals Authority is final and there is no further right of administrative appeal.

For the Commission:

John E. Selbmann
John E. Selbmann
Chief Appeals Officer

Denis Marachi
Denis Marachi
Assistant Appeals Officer
NY:DM:srm

OCT 22 1976

BEST COPY AVAILABLE

A 307

June 10, 1976 630/138

FOR OFFICIAL USE ONLY

TO: Llewelyn Bailey
Engineering Service
Veterans Administration Hospital
New York, N.Y. 10010

SUBJ: Proposed Removal

1. This is to notify you that it is proposed to remove you based on the following reason:

I. On May 14, 1976 at approximately 9:30 PM you struck Mr. Harold S. Schwartz, a visitor at the hospital, in the face with your fist. Your action was witnessed by Mr. Joseph Kaswan, a patient at the hospital.

2. You have the right to reply to this notice personally, or in writing, or both personally and in writing, and to submit affidavits in support of your reply, showing why this notice is inaccurate and any other reasons why your proposed removal should not be effected. The evidence on which this notice of proposed action is based will be available for your review in the personnel office of this hospital. You will be allowed (8) hours of official duty time for reviewing the evidence relied on to support the reasons in this notice, preparing a written reply, securing affidavits, and for making a personal reply. Arrangements for the use of official time or requests for additional time should be made with me.

3. You will be given until the close of business on June 23, 1976 to reply to these reasons personally or in writing, or both personally and in writing. Your written reply should be submitted through me to the Hospital Director. The Hospital Director will receive your personal reply, or he will designate an official or officials to receive it. If you do not understand the above reasons why your removal is proposed, contact me, or the Personnel Officer, Room 1028 West for further explanation.

4. The final decision to effect the action proposed has not been made. The Hospital Director, who will make the final decision will give full and impartial consideration to your reply, if a reply is submitted.

5. If it is the decision of the Hospital Director that you be removed, your removal will be effective not less than 30 calendar days from the day after the date of receipt of this notice.

SUBJ: Proposed Removal - Llewelyn Bailey, Engineering Service June 10, 1976

6. You will be given a written decision as soon as possible after your reply has had full consideration, or after the close of business on June 23, 1976 if you do not reply.

7. You will be retained in an active duty status during the period of advance notice.

MICHAEL A. HORTON
Chief, Engineering Service

Bailey #1143

RECEIPT ACKNOWLEDGED

LLEWELYN BAILEY - June 11, 1976

6/11/76 - 3 15 pm

cc: AFGE Local 2094

BTP

JUL 2 1976

FOR OFFICIAL USE ONLY 630/00

TO: Llewelyn Bailey
Engineering Service
Veterans Administration Hospital
New York, New York 10010

SUBJ: Removal

1. In connection with the letter of June 10, 1976 in which you were given advance notice of your proposed removal, a decision has been made to remove you from employment in the VA, effective July 13, 1976 based on the following reason:

> Reason I as stated in the notice of proposed removal is sustained.

2. In reaching this decision your personal reply and that of your representative Mr. Edward Washington, AFGE, have been carefully considered, with all the evidence developed and my review of the VA Hospital Police Officer Code and performance requirements.

3. You are entitled to appeal this action to the Federal Employee Appeals Authority, United States Civil Service Commission, 26 Federal Plaza, New York, New York 10007.

4. Your appeal must be in writing. An appeal may be submitted at any time after you receive this decision, but not later than 15 calendar days after the effective date of this action. Your appeal must set forth the reasons for contesting the decision to take adverse action.

5. A further explanation of your appeal rights may be obtained by consulting the VA Personnel Officer.

PETER BAGLIO
Hospital Director

SMO:1

CONCUR: 05 001 00

cc: OPF
Director's Office
AFGE Local #2094
Reading File
✓Suspense File

Receipt Acknowledged

Date

A 310

JUL 2 1976

FOR OFFICIAL USE ONLY 630/00

TO: Llewelyn Bailey
Engineering Service
Veterans Administration Hospital
New York, New York 10010

SUBJ: Removal

1. In connection with the letter of June 10, 1976 in which you were given advance notice of your proposed removal, a decision has been made to remove you from employment in the VA, effective July 10, 1976 based on the following reason:

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PETER BAGLIO
Hospital Director

cc Mr Everett

EMD:1

CONCUR: 05 051 00

cc: ✓OPF
Director's Office
AFGE Local 2094
Reading File

Llewelyn A. Bailey
Receipt Acknowledged

7th July 1976
Date

Witnessed by D. R. Riley 7/2/76 10AM.

EXHIBIT E

Court Cy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------------------------------x

LLEWELYN S. BAILEY, :

Plaintiff, :

-against- :

VETERANS ADMINISTRATION, :

Defendant. :

----------------------------------x

Pro Se
76 Civ. 5381 (LFM)

MEMORANDUM

MacMAHON, District Judge.

This is an appeal from a decision of the Civil Service Commission Federal Employee Appeals Authority ("FEAA"), which affirmed a decision by defendant Veterans Administration ("VA") removing plaintiff from his position as a Hospital Supervisory Police Officer at defendant's hospital in New York City. Plaintiff moves* and defendant cross-moves for summary judgment, pursuant to Rule 56, Fed.R.Civ.P.

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* Plaintiff, appearing in this court pro se, has failed to particularize the relief requested. His "motion," however, may fairly be construed as one seeking summary judgment, and we so treat it.

We deny plaintiff's motion, grant defendant's cross-motion, and dismiss the action.

There was substantial evidence at the administrative level to establish the following facts:

Plaintiff was a Hospital Supervisory Police Officer in a VA hospital. On the evening of May 14, 1976, a patient, Joseph Kaswan, was visited by one Harold S. Schwartz. Schwartz stayed past visiting hours. A nurse told him to leave, and he went to the lobby, accompanied by Kaswan, who was in a wheel chair. Plaintiff was on duty in the lobby, and he also told Schwartz to leave.

Schwartz testified that plaintiff's statement to him and Kaswan was inaudible; that plaintiff refused to repeat it but grabbed Schwartz by the arm, took him to an adjacent office, and issued a summons. Once inside the office, the door was closed and a shade was drawn. Schwartz rose from his chair, proceeded to the door to address Kaswan, and plaintiff punched him in the jaw. Kaswan testified that he saw the punch, and both Schwartz and Kaswan testified that plaintiff's elbow struck the shade, causing it to fly up immediately before plaintiff hit Schwartz. Officer Parker, plaintiff's co-worker, testified that he heard Kaswan shout "Oh my God. He's hitting my friend." Parker also testified that he saw that the shade was up at that time. Plaintiff denied striking Schwartz and testified that he merely issued the summonses and gave them to Schwartz, who thereupon departed.

Our function on this appeal is limited. We do not sit as a "Super Civil Service Commission . . . reviewing the substantive merits of government personnel decisions." Gilbert v. Johnson, 419 F. Supp. 859, 885 (N.D. Ga. 1976). Cf. Bishop v. Wood, 426 U.S. 341, 349-50 (1976). On the contrary, our inquiry is restricted to: (1) whether appropriate procedures were followed in the administrative proceedings; and (2) whether the administrative decision is supported by substantial evidence in the record and was not arbitrary, capricious or an abuse of discretion. See McTiernan v. Gronouski, 337 F.2d 31, 34 (2d Cir. 1964); Capolino v. Kelly, 236 F. Supp. 955, 956 (S.D.N.Y. 1964), aff'd mem., 339 F.2d 1023 (2d Cir.), cert. denied, 382 U.S. 858 (1965).

In the instant case, it seems clear that the applicable procedures, set forth in 5 U.S.C. § 7501 (1967) and 5 C.F.R. § 752 (1977), were followed. As mandated by these provisions, plaintiff received written notice of the proposed termination thirty days before termination took effect. The notice stated the reasons for the proposed termination, informed plaintiff of his opportunity to examine the evidence upon which the removal would be predicated, and advised him of his opportunity to answer the charges. A second notice, forwarded to plaintiff after the VA's adverse decision, advised plaintiff of the reasons for his dismissal and of his right to appeal.

In light of the foregoing, we can only conclude that proper procedures were followed and that, contrary to plaintiff's contentions, he was not denied procedural due process.

Noting the conflicting evidence, the absence of medical testimony concerning Schwartz's injury and the fact that the testimony against him came from interested witnesses, plaintiff further contends that the administrative decision is not supported by substantial evidence. These objections, however, are not well taken, inasmuch as they attack merely the credibility of the witnesses and the weight to be accorded to the evidence, matters resolved against plaintiff by the FEAA. We cannot say that the agency acted arbitrarily in crediting Schwartz and Kaswan while failing to credit plaintiff. The evidence supporting the agency's decision, moreover, is certainly substantial. The testimony of Schwartz and Kaswan was sufficient to establish the charges against plaintiff and was corroborated in significant respects by Officer Parker. Plaintiff's attempts to impeach the credibility of these witnesses and otherwise to contradict them did no more than raise an issue of fact for the FEAA's determination [illegible] resolved against plaintiff below.

We conclude, therefore, that the FEAA's decision is based on substantial evidence and is not arbitrary, capricious or an abuse of discretion.

We have reviewed plaintiff's other contentions and find them without merit.

Accordingly, plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary judgment is granted; and the action is dismissed.

So ordered.

Dated: New York, N. Y.
August 31, 1977

Lloyd F. MacMahon
LLOYD F. MacMAHON
United States District Judge

Form 280 A-Affidavit of Service by Mail
Rev. 12/75.

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 7th day of December 1977 she served/ two copies of the within Appendix to Appellee's Brief

by placing the same in a properly postpaid franked envelope addressed:

Llewelyn S. Bailey
645 E. 14th Street
New York, New York 10009

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

7th day of December ,1977

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-[illegible]2838 Queens County
Term Expires March 30, 1979